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THE UNIVERSITY OF ALBERTA

THE SUMMARY PROCEDURE IN ALBERTA

by

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND
RESEARCH IN PARTIAL FULFILMENT OF THE REQUIREMENTS
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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled THE SUMMARY PROCEDURE IN ALBERTA by G. Lorraine Ouellette in partial fulfilment of the requirements for the degree of Master of Laws.

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28th July 1980
(date)

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To the memory of my father,
Christian L. Olsen, (1895 - 1962)
with love and gratitude, this work is
dedicated.

ABSTRACT

The practice of law in the Province of Alberta is governed by the common law procedure evolved in England and transplanted to our shores, perpetuated and modified by the Statutes of Alberta and by the Rules of Court. The Statutes and the Rules have from time to time been the subject of judicial comment. The tout ensemble of this material constitutes the tools of the practitioner and his competent practice of his profession and his client's remedy depend as much upon his familiarity with the rules of practice as upon his understanding of the substantive law. Practice, otherwise called Civil Procedure, has not often stimulated the attention of persons interested in and committed to research and the civil procedure in the Province of Alberta has developed upon a piecemeal basis which results, it is submitted, in some few regrettable inconsistencies and solecisms.

This is a study of the summary procedure in court and chambers, a study which excludes the ordinary law-suit and all of the interlocutory motions and applications connected with it. This work is intended to collect and to classify the occasions upon which an applicant is by statute or rule permitted to approach the Bench and seek redress or mitigation, without the filing of pleadings and upon the basis of his

affidavit filed.

The thesis begins with a brief introductory chapter which adverts to the history of the summary procedure as it developed in the original common law jurisdiction. This chapter raises, without answering, a question as to whether the adversary system, involving as it does viva voce evidence and cross-examination, necessarily constitutes the best and most efficient method of dealing with issues before the court. A preference is indicated for evidence by affidavit in many cases and the thesis proceeds to a consideration of those occasions upon which, under our system, affidavit evidence is commonly accepted: that is to say, those applications known as 'summary' brought by petition, originating notice or notice of motion under the authority of a statute or a rule.

A classification is advanced which, though arbitrary, is urged as a basis for study and each of the ten headings in this classification is considered individually together with the judicial comments reported in respect of those cases which come under it.

The work includes a Schedule (Schedule I, pages 131 to 149) in which have been listed and classified the applications authorized and yet another Schedule (Schedule II, pages 150 to 347), which attempts to collect under each item listed judicial pronouncements reported and cross-references to other relevant material.

Several conclusions are finally drawn:

(a) the profession in Alberta would be the better for a provincial Practice Manual;

(b) there exists a body of authority to the effect that the jurisdiction of a judge in chambers is not co-extensive with that of a judge in court. Some statutes do specifically grant to a chambers judge the power to deal with summary matters provided for in those statutes: others advert to 'the court' exclusively. A suggestion is offered by way of amendment to the Interpretation Act which would obviate the difficulty which may arise as a result of these two jurisdictional aspects;

(c) it is demonstrated that

  (i) the existing practice is not consistent in respect of the summary procedure required to be followed in similar cases and

  (ii) in many instances the rules which we have adopted are not now the most efficient.

Part 30 of the Rules of Court (the Special Application) has been expanded by the writer and a SUMMARY PROCEDURES ACT is recommended, the provision of which, it is suggested, constitutes a useful alternative to the various procedures now authorized.

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The writer desires to express her gratitude to the members of the committee who have kindly agreed to read this thesis: Dr. S.P. Khetarpal, Professor Leonard Pollock, Q.C., Professor M. Park and Professor R.G. Hopp.

Professor Leonard Pollock, Q.C., has suggested the alternate procedure set out in the draft SUMMARY PROCEDURES ACT (section 2(a)), a procedure which constitutes an improvement over my own which had not provided for a special application on notice.

Nora Thompson and Muriel Lefebvre of C.L.I.C. /U. of A. Service Centre placed at my disposal the services of this organization, thereby contributing considerably to the work.

My learned spouse, J. Joffre Ouellette, presently of the office of the Public Trustee, kindly advised me that I was 'on the right track'.

Throughout the exercise I have been conscious of the benign encouragement of W.F. Bowker, Q.C., Dean of Law 1948/1967, whose patience and unfailing kindness made my first term in this Law school a cherished memory.

---oOo---

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CHAPTER 1

THE BACKGROUND OF THE CIVIL PROCEDURE IN ALBERTA AND THE GENESIS OF THE SUMMARY APPLICATION

When the Judicature Acts were passed in England in 1875 and 1925 they represented an attempt to do away with the many corridors which had proliferated in the halls of justice, placing impediments in the path of those who sought to have recourse to the law. The reforms wrought by these Acts sought to produce a coherent body of courts for the settlement of issues arising in the lives of His Majesty's subjects, sweeping away specialized and often duplicitous jurisdictions each of which had a tendency to proceed upon premises distinct from those obtaining elsewhere. The Bench now adopted standard and universal rules of procedure and an attempt was made to fashion a unified, coherent and consistent system of civil justice. [1]

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(1) Under the Act:
  (a) the following courts were consolidated and united into one Supreme Court of Judicature: Queen's Bench, Common Pleas, Exchequer, Chancery, Probate, Divorce and Matrimonial Causes, Admiralty (and, from 1883, London Court of Bankruptcy).
  (b) The Supreme Court was to consist of two parts:
    (i) the High Court of Justice,
    (ii) the Court of Appeal.
[The High Court of Justice] would exercise the former jurisdiction of Queen's Bench and Common Pleas, Exchequer (common law and revenue jurisdiction), Chancery, Probate, Divorce & Matrimonial Causes, Admiralty, London Court of Bankruptcy and those courts existing by virtue of commissions of oyer and terminer, gaol delivery and assize.
L.B. Curzon, English Legal History, London, 1968

The Province of Alberta, in 1905, adopted the Judicature Ordinance of the North West Territories which, in turn, in matters for which it made no specific provision, adopted the rules of the Supreme Court of Judicature as the same had existed on the 1st day of January, 1898[2]. By and large, the Judicature Ordinance purported to transplant to this country a system which many had come to feel was the best in the world. In terms which echo the Ordinance, the Judicature Act grants to our judges all of the powers which resided in the superior courts of England as at the 15th day of July, 1870. There are thus created in Alberta the twin jurisdictions of law and equity administered by the same courts. "The two streams [of law and equity] as has been well said, have met, and now run in the same channel, but their waters do not mix" [3]. The judicial system indigenous to England has persisted in Alberta with very few alterations since its adoption. It is interesting, however, to note that the phenomenon of proliferation of jurisdictions which once occurred in England is now happening in Alberta.

As we leaf through the Alberta statutes we find a surprising number of what one may call '*quasi*-courts', decision-making bodies which have come to control increasingly large segments of our lives. Each of these boards, councils and commissions exercises a

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(2) Ordinances of the North West Territories of Canada, 1905, c. 21 s. 3 (p. 208) Edmonton, 1907. James E. Richards, Gov't printer.

(3) S.C. Bagchi, B.A., LL.B. Snell's Principles of Equity, (1st Ed.) London, 1930.

specialized jurisdiction. Often it deals with matters technical in nature and the members of the quasi-court bring to their task, if not an initial technical expertise, at least that competence which comes with repeated consideration of a narrow range of subjects. Whole areas of subject-matter have thus been removed from the purview of the courts into the competence of the quasi-courts: the Public Utilities Board, the Workmen's Compensation Board, the Board of Industrial Relations, the Right of Entry Arbitration Board; now a new body, the Public Emergency Tribunal, is authorized to be created where necessary for the burial of dead bodies.[4]

In some instances there remains a vestige of control, much attenuated, which may be exercised by the regular courts. This control consists chiefly of a power to quash the decisions of the quasi-courts in situations of mistake of law or of a purported exercise of jurisdiction beyond that granted in the enabling Statute. Gradually, however, more and more the powers of the courts are being eroded by the quasi-courts and areas of decision-making are simply being exercised by Ministerial offices.[5]

Gradually, around each of the specialized jurisdictions there is forming a body of lawyers, specialists regularly in attendance who become expert in a narrow field, coming to know the written rules and

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(4) The Burial of the Dead Act, S.A. 1978, c. 46

(5) E.g., the School Act, R.S.A. 1970, c. 329 s. 146(6) [appeal to the Minister from expulsion of a pupil by a School Board]

the unwritten rules and even the personnel of the body in question. Decision-making, therefore, has once again become fragmented. Gradually and almost imperceptibly as areas of jurisdiction are taken from the courts and placed in the hands of the quasi-courts, we note a relaxation of the rules of procedure and of the law of evidence in the context of the new milieux. The boards often enjoy specific legislative dispensation from the rules which govern the introduction of evidentiary material in the regular courts.

This work does not propose to discuss whether or not these developments are, or are not, desirable. They may well be. The complexity of technical detail which must constantly be taken into account in many of the decisions arrived at by the quasi-courts might present difficulty for ordinary judges learned in the law but not necessarily conversant with the special fields to which the expertise of the board is limited. While this is as it may be it does permit the raising of a question. Is it not at least possible that this massive exodus of decision-seekers from the purview of the courts is in some small measure the result of the delays and formalities which hedge about the normal course of court proceedings?

It is submitted that the adversarial system which finds its ultimate expression in a full-blown court hearing governed by complicated and sometimes contradictory rules, is not always the most efficient nor the most satisfactory method of settling issues. Counsel skilled in the adversarial system are often equally adept at hiding the facts as they are at bringing them to light. The business of adjudication proceeds in the manner of a game of chess and has in essence little to do with setting the facts before the judge and letting him decide the issue.

Perhaps it was an accident of history that gave us the so-called 'adversarial' system while that other, denominated by the invidious adjective 'inquisitorial' was flourishing on the continent. In the 1940 edition of his scholarly work, Dr. R.M. Jackson points out that our commitment to the superiority of oral evidence [over the written deposition] arises from the jury trial. He says

> Until relatively recently the jury were of course too illiterate to deal with documents. If we had had trial by judge alone at common law it is likely that we should be used to the idea of written evidence and it might well be that written evidence which is only in exceptional cases admitted in our courts would have been accepted, had the jury not been incapable of assessing it. [6]

Dr. Jackson's view is, however, not widely held. The more common position is that enunciated by George W. Adams, who sets out

> The use of the adversary process in adjudication is distinctive because it guarantees to each of the parties affected by the decision the right to prepare the representations on the basis of which the dispute is to be resolved. In this sense, the affected parties participate in the solution to their dispute and ordinarily this form of participation will heighten the rationality and acceptability of the result. [7]

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(6) R.M. Jackson, LL.D., The Machinery of Justice in England Cambridge University Press, 1940. Page 67, line 24. The later editions do not contain the statement.

(7) George W. Adams, Towards a Mobilization of the Adversary Process, 1974 Osgoode Hall Law Journal, page 569 at 576

The adversary process, of course, comprehends viva voce evidence and cross-examination to which we contrast evidence adduced by deposition. By reducing, in his argument, the 'inquisitorial' system to its ultimate form and taking the position that, under this procedure, no advocates at all take part in decision-making, Mr. Adams ignores the realities and fails to consider that many jurisdictions have adopted a hybrid process which combines the best features of both worlds. And this, in spite of the fact that he does admit

> that the theoretical nature of a procedure can vary significantly from what actually occurs in practice. [8]

While doing away with some of the more rigid evidentiary rules and permitting the decision-maker more latitude in informing himself as to the true facts of the case before him and while permitting a witness to set down at leisure the facts to which he wishes to depose, such a hybrid system permits also of representations by counsel and allows the position of the contending parties adequate representation. It is interesting to note that the British courts have, since 1905, moved in that direction. Alberta's courts, however, have remained wedded to a body of rules which may have been appropriate in the 1800's but which now may be of questionable validity. Surely anything that expedites the legal process is desirable by definition and he who said of legislators 'dispatch is no mean virtue in a statesman'[9] would elicit heartfelt

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(8) George W. Adams, Towards a Mobilization of the Adversary Process, 1974 Osgoode Hall Law Journal, page 569

(9) 1680

agreement from the body of clients, had he extended his statement to include solicitors.

In an effort to expedite the settlement of controversy, the legislature has provided us with a variety of opportunities for applying to the court or a judge for relief by means of various summary procedures which have as their object the cutting short of the process of adjudication, saving time and funds. Our attitude to the summary procedures, however, is almost shame-faced. There persists in the profession a deep-seated belief that the summary procedures are somehow inferior in quality; that they lack the essential virtue of a full-dress trial; and this, even though the right to cross-examine upon an affidavit filed is a feature of the summary procedure.[10] Even though we may admit that in many instances it is desirable that the parties do 'have their day in court', the fact is that a number of summary procedures are authorized and have been found to be useful.

This work will attempt to examine and classify the summary procedures in court and chambers which are presently authorized in

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(10) Sindlair, J.A., in his judgment in Ulster Petroleums Ltd v Pan-Alberta Gas Ltd, January 25th, 1975 [as yet unreported], said in part

> As so frequently happens in proceedings based on statements of agreed facts, it has turned out that the dispute between the parties cannot be determined in a summary way, but will have to be decided in the light of all the relevant facts established through the normal course of litigation. Regrettable though that may appear to the parties, I believe such a course will prove to their advantage in the long run. One has only to refer to the history of the litigation in Connors v Connors Bros. (1941) 3 W.W.R. 666 (P.C.) to see the unsatisfactory state of affairs that can otherwise result.

the Province of Alberta and, if possible, to draw from the Rules, the statutes and the reported decisions a coherent picture of those areas of practice which permit of adjudication in a summary way.

The proceedings with which we will be concerned are commenced variously by petition, by 'application', by originating notice of motion, by originating motion, by originating notice and sometimes, simply, by a process described in the statute as a 'motion'. A few are begun by Statement of Claim but are intended to be dealt with in a summary way.[11] The distinguishing feature of all of these proceedings is that the statutes and the Rules permit the applicant to seek a hearing without filing formal pleadings. In most cases the procedure permits of the adducing of evidence by affidavit rather than viva voce, as in an ordinary trial. This paper will contend that affidavit evidence is useful and helpful in that it enables the deponent to consider all the facts upon which he wishes to rely; to set them forth in coherent and succinct fashion; that it does not encourage deceit as much as it allows leisure for reflection. With respect to the opinion expressed supra in the quotation from Sinclair, J.A., it is respectfully submitted that it has never been conclusively demonstrated that the crucible of cross-examination contributes materially to the truthfulness of witnesses nor, indeed, that it does much more than to permit of the exercise by counsel of a sometimes considerable sadism.

Many procedures which we now call 'summary' were evolved in

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(11) E.g., actions under the Builders' Lien Act; Woodmen's Lien Act.

the Chancery court and they were initiated by originating notice and originating summons, methods by which, without the necessity of filing formal pleadings or adducing viva voce evidence, a suitor could approach the Bench for summary adjudication of a question.

Before the Judicature Acts there resided in England a partially concurrent jurisdiction in the court of King's Bench and the court of Chancery. Counsel who desired to bolster their pleas with pyrotechnics would prosecute their causes in the King's Bench division where the press came to gather sensation and where the jury commonly sat as trier of fact. Persons, however, who sought quick, business-like decisions in urgent matters betook themselves to the low-key atmosphere of the Chancery court, saving time, money and the many evils attendant upon delay. It was chiefly in Chancery that the summary procedures were evolved although summary applications to the King's Bench also existed.

We began this chapter with a reference to the Judicature Acts which statutes effected a consolidation of jurisdictions. Now, by a recent amendment to our own statutes, the District courts have disappeared. The Court of Queen's Bench as our sole court of first instance in civil matters administers law and equity and hears both trials in the normal course and applications brought under the summary procedure. This paper will attempt to show, however, that there do remain in our procedure vestiges of the old practice, the reason for some of which has ceased to be.

CHAPTER 2

THE SUMMARY PROCEDURE IN ALBERTA TODAY THE JURISDICTION OF A JUDGE IN CHAMBERS

Apart from its multifarious boards of legislative provenance, the province of Alberta now rejoices in one single trial body of superior jurisdiction, the Court of Queen's Bench. There does remain, however, a jurisdictional aspect to applications which is seldom raised perhaps because universal understanding of the matter is presumed: that is the distinction between applications brought in court and those brought in chambers. That such a distinction does in fact exist cannot admit of doubt. To deny it would be to state that the legislature heedlessly employs, now one term, now another, now both, without regard to their significance. Such an admission is not only unseemly, it opens the door to anarchy and so we will not make it.

Section 15 of the Judicature Act lists the British jurisdictions which are conferred by Statute upon the Court of Queen's Bench and specifically include

> the jurisdiction that at any time before the organization of the Court was vested in or capable of being exercised by all or any one or more of the judges of the said courts, sitting in Court or Chambers or elsewhere, when acting as judges or a judge pursuant to a statute, law or custom.

The statute simply transplants the jurisdiction in its entirety. It does not in any way alter it, nor simplify the manner of its exercise. What a judge could do in England in Chambers on July 15th 1870, a judge can do in 1980 in Alberta. and of course this begs the question.

The term 'chambers' is not defined in the Judicature Act and it is not defined in the Rules of Court, although both refer repeatedly to 'chambers'. Some applications are directed by the statute to be brought in court [1] and some statutes in terms permit an application to be heard in chambers [2]. The statutes themselves provide no explanation for the difference in wording. What, exactly, are 'chambers'? Black's Law Dictionary [3] defines 'chambers' as

> the private room or office of a judge; any place in which a judge hears motions, signs papers or does other business pertaining to his office, when he is not holding a session of court. Business so transacted is said to be done 'in chambers'. [Cases are cited].

In Wharton's Law Lexicon [4] we find

> Chambers are quasi-private rooms in which the judges [or masters] dispose of points of practice and other matters not sufficiently important to be heard and argued in court.
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> ....
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> The jurisdiction of a judge in chambers depends partly on statute and partly on the common law. An appeal lies to a Divisional court or to a judge sitting in court according to the practice of the division of the High Court to which the matter in question is assigned.

and there is a reference to the Judicature Act, 1873, s. 40. The above would certainly indicate that the jurisdiction exercised in chambers is in some way inferior and subordinate to that exercised in court; such a conclusion, indeed, is implicit in the appeal from a judge in chambers to a judge in court.

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(1) E.g., the Landlord and Tenant Act, SA 1978, c. 65, s. 21(1), 24

(2) E.g., the Alimony Orders Enforcement Act, RSA 1970 c. 17 s. 2

(3) by Henry Campbell Black, M.A.; St Paul, Minn., U.S.A., 1968.

(4) London, 14th edition.

In the British practice there is no doubt as to the dichotomy.

> The words 'the Court' mean the Court sitting in banc -- that is, a Judge or Judges in open Court; they do not include a Judge at Chambers [5]

In Sovereign Securities & Holdings Co Ltd v Hunter [6] the Ontario Court of Appeal held that an application brought in chambers for dismissal of an action was improperly brought and

> ... a decision as to an issue in the action itself ... is not one to be disposed of on a motion in chambers [6]

and the dismissal of the action was successfully appealed from. The judgment also contains a quotation from Middleton, J. in Seagram v Pneuma Tubes Ltd [7] which reads

> Under Rule 205, any power conferred upon the Court is to be exercised by a Judge sitting in Court unless it is provided in the Rules that it may be exercised by a Judge or Master in Chambers. The applications that may properly be made in chambers are enumerated in Rule 207.

Unfortunately the Rules of Court in Alberta do not contain such an enumeration and the exhaustive list set out for practitioners by the text of the Chancery Orders reproduced in Holmested [8] are not applicable to our practice. The latter authority gives a list of those matters

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(5) The Annual Practice, London, 1910. Vol. 2, page 388. Cases are cited.

(6) [1964] 1 O.R. 7; and see page 13, line 26 and ff.

(7) (1917) 40 O.L.R. 301 at page 303; and to the same effect see Burbank v O'Flaherty (1977) 2 C.P.C. 3 at p. 19 (Ontario County Ct)

(8) The General Rules and Orders of the Courts of Law and Equity of the Province of Ontario, passed prior to the Ontario Judicature Act, 1881 and Now Remaining in Force, with notes by George Smith Holmested, Registrar of the Chancery Division, H.C.J., Volume 1, The Chan cery Orders, at page 78 and ff.

which may be dealt with in chambers applications, some specifically ear-marked to be decided by the Master or a county court judge and others reserved to the jurisdiction of a judge of the high court sitting in chambers.

In Alberta the jurisdiction of the master has, until this summer been provided for in s. 45 of the Judicature Act and set out in Rules 402, 403 and 808. That our practice differs from that of Ontario becomes clear from a reading of the judgment of the Master in Sturgeon Petroleums Limited et al v Yukon Geothermal Co Ltd. [9] This was an application for summary judgment based upon admissions of fact obtained at an examination for discovery. A preliminary objection was raised by the respondent upon the grounds that the master had no jurisdiction to entertain such a motion at all. The Master held that he had jurisdiction to entertain the motion, inter alia because our Rules of Court do not specifically list the jurisdictional limits of a Master or of a judge in chambers and provide simply that

> except as otherwise provided, all motions, applications and hearings other than the trial of actions may be disposed of by a judge in chambers [10].

The judgment, however, fails to deal with the opening words 'except as otherwise provided' and, clearly, where it is otherwise provided, such provision will constitute an exception to the jurisdiction of the

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(9) [1972] 4 W.W.R. 225

(10) Rules of the Supreme Court, Alberta, R. 385.

Master or the Judge in chambers which exists over and above that of the trial of actions.

The jurisdiction of the Master in Alberta is provided for in the Court of Queen's Bench Act[11] and set out in the Rules[12]. Neither the Statute nor the Rules, however, touches the point upon which we are inquiring. Rule 401 in describing the jurisdiction of a local judge adverts to 'actions brought and proceedings taken' (the italics are mine) whereas Rule 402 in delimiting the jurisdiction of the Master speaks only of 'actions brought or proposed to be brought'. There is no mention of other 'proceedings'.

No distinction, semble, is ever so fine that it has not formed the basis for judicial pondering. Chief Justice Milvain in Board of Governors of Mount Royal College v Board of Industrial Relations of Alberta et al[13] had this to say about the distinction between types of application:

> the second objection takes us to s. 24(2) of The Judicature Act:
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> (2) No action whereby the relief claimed ... is an injunction, mandamus, prohibition ... interfering ... with the doing by a person or the omission by a person of an act authorized ... by a statute ... shall be brought ... unless permission ... has first been given by the Lieutenant-Governor in council.
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> It will be noted that the section prohibits without consent 'an action'.

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(11) S.A. 1978, c. 51 ss. 8 - 13 (pages 377, 378)

(12) Rules of the Supreme Court (Alberta) 402, 403 and 808

(13) Board of Governors of Mount Royal College v Board of Industrial Relations of Alberta and Mount Royal Non-Academic Staff Association [1974] 6 W.W.R. 647 (Alberta Supreme Court)

> Section 2(2) of the Judicature Act defines the word 'action' to mean:
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> (a) a civil proceeding commenced in such manner as may be prescribed by the Rules of Court, and include a suit; . . .
>
> Rule 6 of the Rules stipulates that civil proceedings may be commenced in any of three ways, statement of claim, originating notice or petition.
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> This application was launched by notice of motion and not touched by statute. See Rex v Highway Traffic Bd., [1947] 1 W.W.R. 342, [1947] 2 D.L.R. 373 (Alta).

The terms 'action' and 'proceeding' were used interchangeably in the judgment of the Court of Appeal in Ellsworth v Boisvert [14] in which the discussion centred upon an application for a fiat authorized by s. 31 of the Municipal Government Act and a consequential application for an Order in the nature of Quo Warranto. It was held by the Court in that case that the initial application did not constitute a 'proceeding' albeit the Court stopped at that point and declined to comment upon what such an application does in fact constitute and it may well be that upon this point hinges the answer to a jurisdictional question of some importance. 'Action' by Rule 5(a) of the Supreme Court Rules is defined as including any issue directed to be tried. Does it, therefore, include an application by motion which is to be decided upon the basis of affidavits filed? Probably not, if one is to cleave to the reasoning of Milvain, C.J.T.D. quoted supra.

Such inquiry could drive us into subtleties of distinction so fine as to risk absurdity; nevertheless, the distinction is not without respectable precedent. The line between open court and chambers has

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(14) [1974] 2 W.W.R. 250 at pp. 257 to 259

been drawn by no less august an authority than Their Lordships of the Privy Council in McPherson v McPherson [15] in which Her Majesty's advisers addressed their minds to the consequences of a failure to conduct divorce proceedings in open court. In the course of the hearing reference was made to s. 11 of the North West Territories Act, 1886, which, the appellant's solicitors averred, constitutes a distinct statutory direction prescribing adjudication in open court. The section reads

> Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July in the year of Our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant Governor in Council. [16]

With great respect to counsel, the reference, if reference there be, to open court, is oblique. Searching, however, further in his argument, we find a reference to Order 40 of the Judicature Ordinance, 1898 and it is submitted that it is there that a distinction is clearly made between applications brought in court and applications brought in chambers. In Order 40 we find once again the words 'unless otherwise provided' and even by following the jurisdiction back to its source we are not therefore materially assisted. The Order reads, under "Applications

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(15) [1936] A.C. 177

(16) Revised Statutes of Canada, 1886, c. 50, s. 11

in Chambers"

I - By Originating Summons

> 469. Proceedings commenced by originating summons in the Supreme Court of Judicature in England may be so commenced under this Ordinance unless otherwise provided and proceedings by a landlord to recover possession of demised premises from an overholding tenant may be so commenced. No. 6 of 1897, s. 1 (59, 64).
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> 470. An originating summons shall be sealed by the clerk and shall follow form G in the schedule hereto with such variations as may be approved by the judge. No. 21 of 1896.
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> 471. Unless otherwise ordered there shall be at least ten clear days between the service and return of an originating summons. No. 6 of 1897, s. 1 (61)
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> 472. An originating summons may be served in the same way as a writ of summons. No. 6 of 1897, s. 1 (59)

...

II - Generally

> 480. A judge in chambers shall have jurisdiction to hear and determine any application or motion, except where it is by this Ordinance or these rules otherwise provided, that may be heard and determined by a single judge or which by the practice and procedure in the Supreme Court of Judicature in England may be heard and determined by any judge in chambers, master or chief clerk.

Order 39, which dealt with Motions and Applications, would appear to refer principally to interlocutory matters and except for the use of those ever-recurrent words 'except where otherwise specially provided', one might be justified in the view that anything but the trial of an action could originally take place in chambers. The sections of particular interest are the following:

> 458. Applications for summonses, rules and orders to shew cause and applications authorized to be so made by these rules may be made *ex parte*. Other motions in court shall be by

> notice of motion and other applications in chambers by summons except where otherwise specially provided. But the Court or judge if satisfied that delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief may make any order ex parte upon such terms as to costs or otherwise and subject to such undertaking if any as the Court or judge may think just; and any party affected by such order may move to set it aside or vary it. [E. 698] No. 6 of 1893, ss. 470 and 483.
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> ...
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> 463. When on any application or motion in court or chambers it appears to the judge desirable that any question of law or fact should be first determined before proceeding with the complete hearing of such application or motion the judge may direct such question to be first argued or determined upon such terms as to costs, adjournment and otherwise as he deems proper and upon the determination of such question the judge may either finally dispose of the motion or application or proceed with a further hearing thereof as may be proper. No. 6 of 1897, s. 1 (57).

It is submitted that, beyond a specific direction permitting the bringing in chambers of an application for possession against an overholding tenant, the same ambivalence of which we now complain existed in the Judicature Ordinance (North-West Territories) 1898. Beyond the statement to the effect that the English jurisdiction was transplanted to the Territory, there was no clear dichotomy between the portion of that jurisdiction to be exercised in court, and that to be exercised in chambers. Yet both terms are used in some sections, and in some sections reference is made only to 'court', in some only to 'chambers'.

The distinction between court and chambers has only been adverted to in the Alberta cases and has never been exhaustively dealt with. It is not outside the bounds of possibility that it may one day be held that where a statute specifically directs that a matter shall be brought before 'the court' a hearing in chambers may constitute an improper exercise of jurisdiction: indeed,

> When the rules say "the Court or a Judge," it is understood that "the Court" means a Judge or Judges in open Court, and "a Judge" means a Judge sitting in Chambers.[17]

A careful reading of Section 15(2)(a) of the Judicature Act[18] quoted supra reveals that the jurisdiction conferred encompasses that jurisdiction exercised by His Majesty's judges in England, in Court, in Chambers or elsewhere: but that it does not in terms permit the exercise of that jurisdiction by the Bench receiving the same in any particular forum or in any particular way other than the forum and the way in which it was exercised in England. We must take it, then, that such limitations as imposed themselves upon the English judges are also binding upon our own.

Not to insist upon the point but simply to defend it as being arguable, one might look for a moment at the text of the Alimony Orders Enforcement Act[1] which, in the definition section, sets out that 'judge' (i) means a judge of the Court of Queen's Bench and

(ii) includes a judge in Chambers.

We must take it that there is some significance in the addition to the text of paragraph (ii). Whatever that significance may be, it has not

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(17) per Kay, L.J., in In re B-- (an alleged Lunatic) [1892] 1 Ch 459 at page 463.

(18) R.S.A. 1970, c. 193, s. 15(2)(a) (Volume 3 page 2684)

(19) R.S.A. 1970, c. 17, s. 2: amended S.A. 1978 c 51 s. 28(3)(a)

been found necessary to add an equivalent paragraph in most of the statutes of Alberta which provide for motions and applications of a summary kind.

It is possible that the term 'chambers' as we know it: that is to say, a planned occasion upon which counsel present themselves in an apartment which is also used as a court-room and apply to the presiding official by dint of filing petitions, motions, originating notices or other originating document as may be authorized is, in fact, an extension of the court; and it may simply constitute an informal occasion upon which counsel are not required to robe. If this be true it is submitted that this is no-where written and the term chambers, which may also describe a judge's private office, is used to the prejudice of clarity and certainty. It is quite possible that a party might appear in the Court of Appeal and argue successfully that because an application was launched against him in Chambers (rather than at a sittings of the Court) the Order granted was at the least voidable. The Landlord and Tenant Act,[20] for example, specifically provides that

> an application made under ... [the] Act to the ... Court ... shall be by originating notice.

The definition section specifies that 'court' shall mean Supreme Court, District Court or Provincial Court (and now, of course, Court of Queen's Bench or Provincial Court); no mention is made of a jurisdiction to be

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(20) S.A. 1978, c. 65

exercised in Chambers. The variance in terminology between the two statutes is of interest.

Nor is the Interpretation Act of assistance. It skirts the subject but fails to prescribe the forum in which the jurisdiction may be exercised. It may be that the omission simply indicates that the point raised is devoid of substance although to say so would be to flout the Ontario Court of Appeal [21]. The section reads

> 5. (1) Whenever by an enactment judicial or quasi-judicial powers are given to a judge or officer of a court, the judge or officer shall be deemed to exercise such power in his official capacity and as representing the court to which he is attached, and he may for the purpose of performing the duties imposed upon him by the enactment, subject to the provisions thereof, exercise the powers he possesses as a judge or officer of the court.

The italics are mine. The caveat is retained. Again, in our Supreme Court Rules,

> 385. Except as otherwise provided, all motions, applications and hearings other than the trial of actions may be disposed of by a judge in chambers.

The italics are mine. The unanswered question is, does the direction in a Statute that an application shall be made to a 'court' constitute a provision 'otherwise' so as to bring it within the exception mentioned in the Interpretation Act and in the Rules? And if it does not, what, then, is an example of a provision that would take us out of Rule 385?

The Rule quoted above which now appears as 385 in the current edition of the Alberta Rules of Court appeared in the 1962 consolidation of our Supreme Court Rules as No. 439; in the 1914 Rules as Rule 8, and the reference in that edition was to Rule 480 of the Judicature Ordinance, 1905, which reads:

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[21] Sovereign Securities & Holdings Co Ltd v Hunter [1964] 1 O.R. 7 (Ontario Court of Appeal)

> 480. A judge in chambers shall have jurisdiction to hear and determine any application or motion, except where it is by this Ordinance or these rules otherwise provided, that may be heard and determined by a single judge or which by the practice and procedure in the Supreme Court of Judicature in England may be heard and determined by any judge in chambers, master or chief clerk. [C.O., c. 21, r. 480]

Any exceptions to the jurisdiction in chambers, then, came to us from the British practice. The exception in the present rule is not clear. 'Except as otherwise provided'. Where does such a contrary provision reside? Where may we seek it? In Alberta we know that where the Statutes and the Rules are at variance, the Statutes shall prevail.[22] Provisions, therefore, which restrict the plenary power must reside in the Statutes and if we do not conclude this, then the words 'except as otherwise provided' are left with no significance whatever.[23] Not to insist excessively upon the point, the Partnership Act specifically confers upon the judge the power to exercise his functions in Chambers. It is surely unacceptable to attribute to the Legislature no motive other than sheer caprice for the occasional and arbitrary inclusion of a section granting a chambers jurisdiction.

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(22) Canadian Pittsburgh Industries v Industrial Relations Board (1977) 5 A.R. 407, per D.C. McDonald, J. AND SEE ALSO Re: enactment of a Rule of Court by Order-in-Council: where an O.C. in fact amends a Statute, the Order is void and of no effect. Stein v Wallace [1937] 3 W.W.R. 654 (Alberta Supreme Court)

(23) R.S.A. 1970, c. 271 s. 26

Then, again, Rule 331 specifically directs the applicant for a renewed judgment to appear before 'a judge in chambers', but the rule goes on to specify that 'if, upon return of the motion, ... the court is satisfied ...' which words would indicate that 'judge', 'judge in chambers' and 'court' have, at least in this instance, been used indiscriminately in the drafting of the rule.

The writer believes it almost certain that the distinction between the term 'court' and the term 'chambers' as employed in those sections of the statutes dealing with summary applications is illusory and has its origin in a frantic clinging to tradition even where the source of that tradition and its meaning have long been lost in the mists of antiquity. It would really appear that the terms persist simply because no-one has taken the trouble to confront the issue. This is not, however, completely satisfactory as a conclusion, first because, as mentioned supra, the profession is not, vis-a-vis the legislature, entitled to make it and second, because there are vestiges of a dichotomy implicit in the appeal process which would assign a dominant role to a judge sitting in court over a judge sitting in chambers. It is submitted, however, that sooner or later the question must be squarely addressed and the distinction, if any, defined, for in the Sovereign Securities case lies the germ of discomfiture and confusion for counsel appearing, perhaps, in a matter governed by a limitation date.

CHAPTER 3

THE ORIGINATING PROCESS; MOTION, SUMMONS OR WRIT

Having dealt, albeit inconclusively, with the question of venue, one should perhaps discuss briefly the various methods by which process may be initiated and inquire into their provenance. Traditionally we have issued from the University repeating the old story about the student-at-law who appears in Chambers to be questioned by the presiding judge in the following terms:

- "How did you get into Chambers, Mr. Jones?"

- "Through the door, Your Honour", replies the mystified acolyte. (Laughter). We all know that there are four ways to enter the Court House: be Court or Chambers our destination: we may issue a Statement of Claim, a Petition, an Originating Notice (sometimes called an Originating Notice of Motion) and, in exceptional cases by statute only, a simple notice of motion. Such is the catechism we repeat at the knee of our principal and one of the basic tenets with which we must be conversant by the day of our call to the Bar. We know, too, that what we now describe as an originating notice combines within it the nature of the quondam Originating Notice and another document once denominated Originating Summons; and although the name of the latter, except for its inclusion in the Rules, has been dropped from our lexicon, it is important to remember its properties. The distinction between a process commenced by Originating

Notice and Originating Summons was at one time of considerable importance for upon this distinction hung the question of whether the consequential Order was a 'judgment in an action', or something less. The point is discussed by Lord Esher, M.R., in Re Holloway, Ex Parte Pallister [1], in the English Court of Appeal. His Lordship explains that the sine qua non of an action is that its originating document, the Summons, calls upon a party adverse in interest to appear before the Court and to show cause why the Order prayed for should not go. The Motion, in this context, is not such an originating document as initiates an action and the Order obtained as a result of a Motion, then, does not partake of the quality of judgment. The dichotomy appears in the Ontario practice and in the oft-quoted case of Bendiy v Munton, the Ontario Court of Appeal echoes Lord Esher in Re Holloway:

> In the Consolidated Rules 'action' is limited to a proceeding initiated by a Writ of Summons and does not include a proceeding begun by Originating Notice. [2]

This judgment serves to illustrate how little help is to be had from the practice cases of another jurisdiction: even within Canada. The case, while interesting historically, would at first blush appear to have no relevance whatever in Alberta in the light of the definition of 'action' set out in the Alberta Rules of Court which reads "action includes any issue directed to be tried" [3], no distinction being drawn between

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(1) [1894] 2 Q.B. 163

(2) [1932] 1 D.L.R. 534; [1932] O.R. 123

(3) Rule 5 (1)

documents which initiate the proceedings. One can only hope that no judge will seize upon the thought that in default of a 'direction' (which might be construed as a specific order setting a matter down for hearing), Bendjy v Munton and its principle might still apply and a motion pursuant to which no material was filed by the respondent be said to culminate in something less than a judgment.

Another point of variance between the situation in Alberta and that prevailing in Ontario is also illustrated in Bendjy v Munton, in which judgment the Court sets out that the procedure initiated by originating notice is not dealt with at all in the Judicature Act, being covered entirely in the Rules, and where the Rules are inconsistent with the statute in Ontario, the Rules prevail in matters of practice. Such is emphatically not the case in Alberta where the courts have repeatedly reiterated that where the Rules and the Statute are at variance, the Statute shall prevail [3A].

It is interesting to note the various directions in which the common law practice has evolved in parallel jurisdictions in Canada. In Manitoba, for example, a great many matters are dealt with in chambers rather than in court and as a result a large proportion of the reported cases dealing with motions come from the Manitoba reports. The summary procedure has evolved in that province and

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(3A) Note 22 at page 22; see, however, the judgment of Milvain, C.J. T.D. in Board of Governors of Mount Royal College v Board of Industrial Relations et al [1974] 6 W.W.R. 647

has evidently proved to be successful as a means of dealing expeditiously with a variety of matters and there seems to be a tendency to examine the principles involved, sweeping away some of the artificial distinctions which we inherited from Britain and which, to some degree, remain enshrined in the Rules of Court for the Province of Alberta. As far back as 1951 the Chief Justice of the Court of King's Bench in Manitoba discarded what to him appeared to be an arbitrary and meaningless distinction. An application was brought to have a caveat discharged. The Statute provided that such an application should be launched by way of 'notice of motion returnable in chambers'. The applicant proceeded by originating notice to a judge in chambers. The respondent took the preliminary objection that the motion was not properly before His Lordship in that it should have been made by 'ordinary' notice of motion. Williams, C.K.J.B. dealt with the question as follows:

> An originating notice is a notice of motion: Rule 14(1), Form 15. By Rule 15
>
> > Where by a statute a summary application without the institution of an action may be made to the court or a judge, the application shall be made by way of originating notice, unless the statute prescribes another procedure ****
>
> This Rule was new in Manitoba in 1939 and was passed in order to obtain uniformity of practice. It has the force of statute: see sec. 101 of The King's Bench Act, RSM 1940, ch 44. See also sec. 102.
>
> There is nothing in sec. 146 which excludes the application of Rule 15 and the applicant's procedure was correct. I point out that an 'ordinary' notice of motion requires only two clear days' notice (Rule 149(1)); while an originating notice requires seven clear days (Rule 149(2)). This enures to the benefit of

the respondent. [4]

In the Alberta Rules of Court, 'originating notice' is defined [5] as 'a pleading by which an applicant commences his action'. 'Notice of motion' is not defined in the definition section of the Rules but it is dealt with, generally, in Rule 384 where it is denominated 'motion' and also in Part 29 which is entituled 'Motions and Applications'. Rule 738 lays down that

> an Order in the nature of mandamus, prohibition, certiorari, habeas corpus or quo warranto may be granted upon application by notice of motion returnable before the Court.

At the risk of insisting too much upon the point, it should be repeated that 'notice of motion' is not defined in Rule 5, nor, indeed, elsewhere in the Rules of Court although there are multitudinous references to the procedure. There would not appear to be any essential difference between the legislative direction upon the matter existing in Alberta and that which prevailed in Manitoba in 1951 unless one wishes to advert to the distinction drawn by Chief Justice Milvain in the Mount Royal College case [6] though, beyond taking the application in question (which had been begun simply by notice of motion) out of the category of 'actions', His Lordship did not define the vehicle itself.

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(4) Rystephaniuk v Prosken [1951] 3 W.W.R. (NS) 76 at pp 88 and 89

(5) Rule 5(k)

(6) Board of Governors of Mount Royal College v Board of Industrial Relations of Alberta and Mount Royal Non-Academic Staff Association [1974] 6 W.W.R. 647 (Alberta Supreme Court, Trial Division, per Milvain, C.J.T.D.)

An old case in the Alberta Appellate Division would appear to recognize the notice of motion as a proper means of commencing an application, provided there is legislative authority for so doing: and the corollary point is made that where no such authority exists, the omission will go to jurisdiction. Frank Ford, J.A., speaking for the Division in Brown v United British Insurance Company Ltd [7] remarked

> I agree that the form of the proceeding taken by the insured, by way of notice of motion, is not an improper one if there is any authority for the making of the order appealed from. There are a number of instances in which a proceeding may be commenced by even an informal ex parte application[8]; see Moreau v Baker and Moret [1947] 1 W.W.R. 1098; 28 C.B.R. 160; but here there being no authority either for the application or the order there is nothing in the Rules of Court which assists the Respondent.

Now that the distinction between a 'judgment' and an 'order' is blurred and now that the two procedures of 'originating summons' and 'originating motion' have come to be included indiscriminately under 'applications brought by originating notice', wherein, essentially, does a notice of motion (other than an interlocutory motion, of course), differ from an originating notice? What distinguishes the character of one from the other? Why is a notice of motion which originates, let us say, an application for an order in the nature of mandamus and which allows a respondent two days to reply, sufficient to launch

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(7) (1951) 1 W.W.R. (N.S.) 767

(8) See, however, the comments of the Appellate Division in Ellsworth v Boisvert [1974] 2 W.W.R. at pages 257 to 259, quoted supra at page 15.

such an application whereas an originating notice of motion which allows the respondent ten days in which to enter an appearance, insufficient to constitute proper notice of the proceeding? It is submitted that the reasoning of the Chief Justice in Rystephaniuk v Prosken [9] should prevail and that such arbitrary and meaningless distinctions as that presently drawn between originating notice and a simple notice of motion should be expunged from the practice. This is all the more true in that there are situations in which the applicant may be appearing to pray for more than one remedy, either concurrently or in the alternative, and if the applicant should be required by the Rules to ask for one such remedy by originating notice and the other by simple notice of motion, he finds himself in the position of having to file two originating documents in respect of the same application: a state of affairs which is not satisfactory.

It is not surprising that a forward-looking view should obtain in Manitoba. In that province a great deal of use has been made of the summary procedure. In Alberta the courts have been reluctant to short-circuit the process of adjudication and the Court of Appeal as presently constituted leans heavily, semble, towards encouraging the airing of questions in a full-dress trial, complete with oral evidence, cross-examination and all of the fireworks of which counsel may be

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(9) [1951] 3 W.W.R. (N.S.) 76

capable. Some of Their Lordships of the Court of Appeal, themselves able trial counsel, naturally incline to the view that only in a trial can the facts behind the issue be thoroughly sifted and justice done. This, in any case, is the theme of the judgment in Ulster Petroleums Ltd v Pan Alberta Gas[10], an application brought under the provisions of Rule 410(e) by originating notice of motion for the determination of the rights of the parties to a written instrument. On January 28th, 1975, the Court of Appeal held that

> the material before the Court pursuant to Rule 410(e) is not sufficient to determine whether, from a business point of view in light of the circumstances, the permits and approvals in existence on August 26th, 1942, made feasible the November 1st, 1942 purchase. This is a material fact in determining the rights of the parties and it is neither in the record nor can it be inferred from undisputed facts before the Court.

The question was therefore directed to be settled by the normal course of litigation although it is submitted that it would have been open to Their Lordships, had they been so inclined, to direct the trial of an issue as to the disputed fact alone, in the interests of efficiency and at a considerable saving of time.

It is clear, however, from the above judgment that Rule 410(e), a comparatively new rule, is going to receive restrictive interpretation and unless a question falls squarely and unequivocally within it, the summary procedure will not be used.

On the authority of the Ulster Petroleums judgment, if the Court

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(10) Unreported

can find that it is not in possession of all material surrounding circumstances, an application may simply be denied and counsel directed to start all over again by statement of claim; and this is true even though, in the words of the Ontario Appellate tribunal

> an Originating Notice results in a summary hearing of the application: but this does not in any way deprive the party against whom proceedings are taken of any right, for by Rule 606 [our Rule 409] the Judge may either summarily dispose of the questions arising on the originating notice or give such directions as he may think proper for the trial of any questions arising upon the application.[11]

Rule 407 also allows the Judge to permit oral evidence at the return of the motion and so it is difficult to see how the court could opine that the summary procedure would not suffice to afford to each of the parties a sufficient opportunity of presenting his material. It is possible, of course, that Their Lordships addressed their minds rather to Rule 410(e) itself as establishing an iron-clad condition as to the summary procedure's being permissible at all and that they came to the collective conclusion that there was, in the case at bar, such uncertainty as to the facts as to take the matter out of the realm of 410(e) and leave open no avenue whereby counsel might approach the Bench in a summary way. Certainly the judgment would allow such interpretation: but it is submitted that almost any possible application under Rule 410(e) may be said to partake of a measure of uncertainty in respect of the background of the written document. The point was certainly so moot as to have admitted of solution either way. Had the facts been such as to bring the

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(11) Re Patterson (1928) 62 O.L.R. 255 at 256

proceeding, in the view of Their Lordships, within the scope of the Rule, one might have found our Court of Appeal adjudicating fully in the matter for

> .... proceedings having been duly commenced by Originating notice, the jurisdiction of the Court is as unlimited as it would be in an action instituted by the issue of a [Writ of Summons] [which, in Alberta, would be a Statement of Claim] [12]

Since there is now no difference in our practice between the order of a Judge obtained upon originating notice and the judgment of a court after trial and since, in the statutes of Alberta there are authorized a great many summary proceedings, in addition to the ones mentioned in the Rules of Court, it would seem a useful exercise to survey these procedures. A tabulation of the various authorized summary procedures will assist analysis of them to determine what, if anything, constitutes the differences between them and a determination of whether such differences are salutary and meaningful or whether they simply unnecessarily complicate the practice.

To recapitulate, we have three principal prescribed means of initiating process: the statement of claim, the petition, the originating notice, all of which are set out in the Rules. The statutes variously prescribe one of these three and, in addition, originating notice of motion, simple notice of motion and sometimes, simply, 'motion'. The Rules make reference to applications for orders in the nature of one of the prerogative Writs: these, the Rules prescribe, must be applied

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(12) Re Millar [1937] O.R. 382; [1937] 3 D.L.R. 234

for by simple notice of motion. It would seem that between the statutes and the Rules one should experience no difficulty in choosing an initiating vehicle.

Nothing in practice, however, is ever simple nor, semble, does any statement stand unqualified. The Rules of Court, with exemplary clarity, lay down that

> where under any statute or regulation proceedings may be taken by originating summons, the proceedings may be taken by originating notice as hereinafter set out.

The trouble is that never does a statute or a regulation provide that the proceedings may be taken by originating summons. The statutes of Alberta variously direct that proceedings may be commenced by originating notice of motion, originating notice, notice of motion, summary application, notice of intention to appeal, notice of appeal, motion in the nature of Quo Warranto (in the Municipal Government Act); sometimes, simply 'on notice'; occasionally by Petition, but never by originating summons. To the above are added by statute a procedure denominated, simply, 'motion' which denotes, apparently, a procedure more expeditious than originating notice for in many cases the time for service upon the respondent is materially abridged in respect of applications brought in this way, but which differs from an originating notice of motion in no other respect. The general procedure which obtains in both instances is consistent. Affidavits in support of the application will be filed and served with the notice and both forms initiate a proceeding which opens a file in the office of the clerk. There is now, in addition, a new procedure which was formulated in or about the year 1969 and which is authorized by Part 30 of the Rules. Part 30 provides for a preliminary ex parte application for directions at the hearing of which preliminary application the presiding judge determines what persons must be served with notice and how the motion will be heard. Thereafter the proceeding is identical to that prescribed for proceedings begun by originating notice; indeed, if the application is not dealt with upon the ex parte application, the applicant will then be directed to issue an originating notice.

On a literal reading, then, of the Rule, there is no time at which the originating notice (Form G) may be used to approach the Court pursuant to a direction in a statute and the various directions in the Acts of the legislature are left to stand alone in matters of practice. This anomalous position is shored up by the fact that the statute itself frequently prescribes the notice to be given, the persons to be served and the material to be presented upon the application and the practice in summary applications is thus fraught with the dangers which attend upon unfamiliar paths.

Proceeding further along this line of argument, it must be mentioned that the Rules of Court while they prescribe the form of originating notice, do not mention the originating notice of motion. Rule 410 permits us to apply by originating notice for advice and directions under the Trustee Act[13]. By 410(d) 'where under a statute ... provision is made that proceedings may be taken by originating notice', we may presumably avail ourselves of this form of originating process: nothing, however, in the Rules authorizes us to employ Form G when the statute specifically directs us to bring our application by originating notice of motion, nor does it mention what form shall be used when the statute prescribes this procedure, leaving us with the possible conclusion that *expressio unius est exclusio alterius*. The Administration of Estates Act[14], for example, does not refer to an originating notice, but rather to an originating notice of motion and we are forced to speculate as to why the legislators have made this distinction. If no distinction is intended it goes without saying that the words 'of motion' should not appear in the statute for one is led inevitably to the conclusion that the words 'of motion' indicate legislative sanction to the bringing of an application simply by a notice of motion which is described as 'originating' only by reason of the fact that it does originate the proceeding: a conclusion which, although it is not without precedent, would appear to be piccayune, quibbling and even perhaps actually sophistical.

To sum up, then, we have the Rules of Court authorizing the summary procedure commenced by originating notice (Form G)

(a) when under a statute or regulation proceedings may be taken by originating summons (Rule 404)

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(13) Rule 410(f)

(14) R.S.A. 1970, c.1, section 32(1)

which is never;

(b) in specific cases set out in Rule 410 which list overlaps, in many cases, the permitted circumstances described in the statutes [15];

(c) when 'under any statute or these rules, provision is made that the proceedings be taken by originating notice'. Nothing is said about the cases in which the statute prescribes an originating notice of motion. It is also interesting that Form G in the Rules, while it gives us the format of the notice itself, fails to provide the notice to the respondent which must be endorsed upon an originating document of any kind upon failure to comply with Rules 88 and 89 and the failure of which has been taken to nullify a proceeding [16].

A question which arises and which has probably more substance than has the distinction between originating notice and originating notice of motion, is whether a reference in a statute to a 'motion' brings us within the purview of Part 30. If the statute specifies 'notice of motion' in terms, it would appear, from a reading of the rule, that because a procedure is prescribed in the statute, Part 30 is thereby excluded.

Often a statute will leave to the judge hearing the application a wide discretion in respect of who shall be served with notice, the manner of service of the notice, the length of time to be given to the respondent before the hearing of the application, the mode of trial.

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(15) See, e.g., application for Possession of Land

(16) Hanson v Hamid, (1977) 2 Alta L.R. (2d) 163

Often, although these aspects of an application are specifically set out in the statute the words are added 'or as directed by the court'; in a case of this kind it is impossible to commence the proceeding by originating notice for if counsel commences the proceedings before obtaining the court's instructions then he must appear upon the returnable date to hear the court determine the persons to be served, the time, the manner of service, the next returnable date, the manner of the presentation of evidence. In short, he must then issue another originating notice, which is patently absurd. In any circumstance in which there is doubt in the mind of counsel as to notice or as to the respondents: any doubt, indeed, concerning the procedure which the court will desire to see followed, Part 30 is indicated, but the words of the Rule exclude it in cases in which the statute prescribes an originating vehicle. Surely this cannot be what the legislature intended.

There are some two hundred and fifty separate applications authorized under the statutes of Alberta. Broadly speaking, these applications fall naturally into a limited number of categories, each of which possesses certain characteristics which distinguish it from the others. That is not to say that the practice recommended in respect of each category is consistent: far from it. It is true that the categories into which this paper divides the applications are quite arbitrary: but categorization is, it is submitted, essential if the subject-matter is to be dealt with at all. For convenience, the following types of application have been isolated and denominated by the names assigned:

1. Appeals (a) from a self-governing professional body;
   (b) from a quasi-court
2. Adjudication
3. Injunction. This term is not used in the technical sense, but in the sense explained infra: that is to say, peremptory orders, negative and positive, are included in the category.
4. 'Show cause' applications.
5. Advice and Directions
6. Review and Approval
7. Administrative Sanction
8. Fiats and Certificates
9. Mitigation
10. Distribution.

The following chapters will deal individually with these categories. The numbers have been used to characterize the list of applications which appears in Schedule I of this work. A study of the categories listed involves a perusal of the enabling statutes and reading of the judgments reported in which the applications have been dealt with by the Alberta courts. This study has yielded a picture of the 'categories' as they presently exist and the following chapters are an attempt to summarize the salient features of each category listed.

CHAPTER 4

APPEALS

By far the largest number of appeals concern requests to the court for orders altering decisions arrived at by professional bodies which, by virtue of provincial legislation, have the power of self-government and which regulate their own personnel. In each of these cases a council consisting of members of the profession or trade concerned has considered a complaint against a member and concluded that the member, having committed an act unbecoming his guild, should be punished by fine or suspension or, in more serious circumstances, stricken from the rolls entirely.

Three professions appeal by notice of appeal directly to the Court of Appeal: the legal profession, the medical profession and the members of the Institute of chartered accountants. Appeal by notice of appeal to the Court of Queen's Bench is prescribed for dentists, dental auxiliaries, engineers and members of related professions; also for veterinary surgeons. Originating notice of motion in the Queen's Bench initiates appeals from opthalmic dispensers, Alberta land surveyors, optometrists, psychologists and social workers. An 'originating notice' (if so be that it is a different document) commences appeals from psychiatric nurses in training and from registered nurses. A simple notice of motion suffices for pharmacists and no method is prescribed for launching an appeal by agrologists, physiotherapists, dental mechanics, naturopaths, podiatrists, psychiatric nurses or registered dietitians.

Acts which provide for the licensing of persons who cannot be termed professionals also envisage appeals from orders revoking, ostensibly for cause the right of those licensed persons to carry on their occupations. These include an appeal by originating notice launched by the operator of a collection agency under the Collection Practices Act and a salesman under the Mortgage Brokers' Regulation Act, a notice of motion filed by a salesman of investment contracts under the Investment Contracts Act and an appeal, presumably under Part 30 of the Rules, by a landman who has been suspended under the terms of the Landmen Licensing Act.

Other appeals are provided for in the statutes: very limited appeals by leave only may be taken from decisions of the Protection Area Appeal Board under the City Transportation Act; from the Local Authorities Board under its constituent Act, from the Oil and Gas Conservation Board; from the Planning Board: these exclusively upon matters of law or jurisdiction.

No procedure is prescribed in respect of appeals (which may be launched by leave only) from the Public Utilities Board or the Crimes Compensation Board: the latter of these to the Court of Appeal and upon questions only of law or jurisdiction. Applications from orders addressed to property-owners and directing them to repair or demolish existing structures or other improvements upon their land are provided for in the Municipal Government Act and in the Public Highways

Development Act and in these two statutes no method of proceeding is laid down. As will be mentioned infra, a markedly similar application, however, under the Fire Prevention Act is required, for some reason, to be brought by petition.

Originating notice of motion is called for in the Companies Act where the applicant feels himself aggrieved by the refusal of the Registrar to approve a company name applied for by him or to forbid the use by a person other than the applicant of a name to which the applicant lays claim, or which, the applicant alleges, ought not for some other reason be used by the respondent. Appeals from the decisions of other provincial authorities are by originating notice of motion under the Fish Marketing Act, the Individual Rights Protection Act, the Mental Health Act. An originating notice (again, if there be any real difference between this and the originating notice of motion) opens the appeal of an adult from a guardianship order under the Dependent Adults' Act, and of an employer from an order under the Occupational Health and Safety Act. A notice of intention to appeal is filed in the appropriate court by an appellant under the Drainage Districts Act and the Election Act whereas a simple notice of motion will suffice for an application for recount under either the Municipal Election Act or the School Election Act: a wonderful instance of consistency. A notice of appeal begins proceedings under the Child Welfare Act (section 27) and the Surface Rights Act, but under the Domestic Relations Act when appealing from the decision of a Family Court judge, the appellant must proceed by stated case.

Last but not least, a petition is launched by a citizen aggrieved by the Fire Commissioner's order to repair, alter or demolish (which order is really the same in substance as that mentioned supra in the Municipal Government Act and the Public Highways Development Act. A petition is also brought by the appellant under the Land Titles Act who considers himself aggrieved by any order of the Registrar.

Even if applications which have been included in the Appeals category contain some items which a purist might reserve to another classification, it is submitted that the wide range of prescribed procedures included in the above summary indicates at the very least that in the matter of appeals from professional councils or from boards or other statutorily constituted authorities, the procedure has been prescribed upon an ad hoc basis, piecemeal, without any conscious attempt to analyze the principles which ought to govern and simplify the process.

We have insisted enough upon the originating document. It is submitted that this does not constitute a question of great importance: it is rather a matter of piccayune distinction among a number of similar procedures which envisage the same result. One would expect that, in due course, the Rules Committee will be recommending a standard form of universal application which will serve to launch appeals and which will in substance comply with the requirements enunciated by Stevenson, J. in the Dudley case[1] and which will obviate the necessity for varying the procedure of appeal from statute to statute without any real reason to justify the variation. A notice of appeal would appear to represent the most efficient vehicle by which to announce to the court above and to the body appealed from that the applicant intends to seek a further remedy; a notice of appeal or, in a proper case, an application for leave to appeal, for appeal does not by any means always lie as of right.

To open a discussion of the principles governing the appellate process it may be useful to hearken to the words of Clement, J.A., in Macri v Council of the City of Edmonton[2] in which he says, quoting Chief Justice W.J. Ritchie in Chagnon v Normand[3]

> We think that an appeal, which is unknown to the common law, must be given by statute in such clear and explicit language that the right to appeal cannot be doubted.

It is necessary, therefore, when considering an appeal, to begin in each case by analyzing the source of the appellate jurisdiction we would invoke for the purpose of determining how far the legislature has gone in abrogating the common law rule.

Where the statute prescribes a preliminary application to a single judge of the court of appeal for leave to appeal to that body, is that

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(1) Dudley v Alberta Chiropractic Association (1977) 6 A.R. 66 and cf. infra at page 58

(2) (1977) 2 A.R. 378 at 383

(3) (1889) 16 S.C.R. 661

judge acting as a member of the court, or rather as a persona designata? If leave is refused, what then is the recourse, if any, left to the appellant? This question was canvassed in Macri v Council of the City of Edmonton [4] and Justice Clement discusses the point in a clear and helpful way. The headnote puts the facts as succinctly as possible:

> This case arose out of the granting of a development permit to a landowner in the City of Edmonton. The plaintiff opposed the granting of the development permit and appealed to the Development Appeal Board. The Development Appeal Board affirmed the issue of the development permit. The plaintiff appealed to a judge of the Appellate Division under s. 146(2) of the Planning Act, R.S.A. 1970 c. 276 for leave to appeal from the decision of the Development Appeal Board. The application for leave to appeal was dismissed. The plaintiff appealed.

The section in question reads, in part, as follows:

> Leave to appeal shall be obtained from a judge of the Appellate Division upon application made within 30 days after the making of the order or decision of the tribunal sought to be appealed from .... [the rest of the section is not relevant]

The words of the section were considered by the Appellate Division en banc and the first question raised was, whether the statute by these terms created the judge of the court persona designata or whether, on the other hand, in considering the application for leave, the judge was simply acting as a member of the court. The decision was that the judge considering the matter of whether or not to grant leave to appeal acted, not as persona designata, but as a member of the court. Per Clement, J.A.

> The distinction between a judge acting in the capacity of persona designata and one acting as a member of his court is drawn by

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(4) (1977) 2 A.R. 378

Masten, J.A., in Hynes v Swartz, [1938] 1 D.L.R. 29, at 37, where he addresses himself to the Ontario equivalent of our Extra-Curial Orders Act:

> The right of a party to appeal to this court from an order or judgment of a judge and the jurisdiction of the court to entertain such an appeal varies according to the nature and source of the jurisdiction under which the judge acts. He may act by virtue of the authority conferred on him by the letters patent appointing him a judge or he may be acting by virtue of a special and distinct authority outside of and different from that which he possesses by virtue of his status as a judge.
>
> If he acts for the court of which he is a member and by virtue of the letters patent creating him a judge the right of appeal to this court is governed by the Judicature Act and the Rules of Court.
>
> ....
>
> I am of opinion that a judge of this Division hearing an application for leave to appeal under section 146(2) is not acting as persona designata, but rather as a member of this court exercising in a preliminary way a part of the limited jurisdiction conferred by section 146(1) to determine first whether or not there is a question of law or jurisdiction arising out of a decision of a development appeal board and, if so, the legal consequences having regard to section 147(c).

If the first situation obtains (and the statute will define it) the Macri case lays down that the judge considering whether or not to grant leave to appeal acts, not as persona designata, but rather as a member of his court for the limited purpose of deciding whether an appeal does lie. The power of the court en banc to review such a decision is strictly limited and Clement J.A., after reviewing the relevant authorities, puts the situation clearly in focus as he states

> It is clear from the foregoing that the inherent supervisory appeal jurisdiction of this Division over a member sitting in chambers as a judge of this Division is limited. The judge in chambers is not to usurp the function of this Division in reviewing the decisions of development appeal boards, but he is to exercise a properly informed preliminary judgment on an

> application that meets the requirements of section 146(2) upon which his jurisdiction rests. In my view it would require a demonstrable and decisive error on his part in exercising the jurisdiction given by that subsection to induce this Division to review his decision.[4]

The italics are mine. We may take it, therefore, that where the statute limits appeal from a Board to a question of law or jurisdiction and provides for a preliminary application to a member of the appellate court, that member's function is as described in Macri. The successful appellant from a refusal of leave must show demonstrable and decisive error in the exercise of his jurisdiction by the single judge.

Other rules obtain in cases in which the judge acts as persona designata. There would not appear to be an Alberta decision directly upon the point but the judgment of Clement J. A. in Macri adverting as it does to the judgment of Middleton, J. A. in Hynes v Swartz[5] permits us to seek in that Ontario judgment the principles which govern appeal from a persona. As a preliminary measure it behooves us to seek the statute and to compare the terms of the Ontario Act with the words of our own legislation. Having done so we find only a slight shifting of emphasis, of which more hereafter, but no essential difference in the terms of the statute. The judgment of Middleton J. A. in Hynes v Swartz is widely quoted: not only does Clement, J. A., repeat it in Macri, but it also appears in Sanagan[6] who uses his Lordship's words to illuminate

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(4) Macri v Council of the City of Edmonton (1977) 2 A.R. 378 at para. 12 of the judgment

(5) [1938] 1 D.L.R. (C.A.)

(6) The Encyclopaedia of Words and Phrases, Legal Maxims, Richard de Boo Ltd., Toronto, 1979. Gerald D. Sanagan, Ed.

and explain for us the term persona designata. The quotation is as follows:

PERSONA DESIGNATA

A person chosen

> (Ont.) The term persona designata, used in the Judges' Orders Enforcement Act, R.S.O. 1927, c. 111, is unfortunate. "The term has been in use for a long time in the law relating to the construction of wills. I cannot find that it has been in general use in describing the functions of a Judge before the middle of the last century. It was there used generally in the form of a person designated by the statute to perform certain useful functions, not judicial in their nature, and to distinguish such persons from a judge or officer performing judicial or other functions representing the action of a Court, and so used, the meaning is radically different from cases where the same words are used in discussing the problems presented by wills. The law dictionaries have seized upon the term as used in connection with wills and the definition there given could never be applied with any degree of satisfaction to the cases defining the judicial function": per Middleton, J.A. A judge may act by virtue of the authority conferred on him by the letters patent appointing him a judge or he may be acting by virtue of a special and distinct authority outside of and different from that which he possesses by virtue of his status as a judge. If he acts for the court of which he is a member and by virtue of the letters patent creating him a judge the right of appeal to the Court of Appeal is governed by the Judicature Act and the Rules of Court. If he acts outside of the authority which he holds as a judge, that authority is subject to the provisions of the statute under which he acts: per Masten, J.A. S. 22 of the Ontario Architects Act, 1935 (Ont.), c. 90 provides that anyone whose membership in the Association of Architects has been suspended or cancelled by the Board created by the Act may "appeal to a judge of the Supreme Court" and "the practice and procedure in such an appeal shall be the same as upon an appeal from the report of a Master or Referee of the Supreme Court". The statute contains no further right of appeal. A judge acting under this statute is acting as persona designata within the meaning of s. 3(b) of the Judges' Orders Enforcement Act, R.S.O. 1927, c. 111, and by reason of the latter Act a further appeal lies, as of right, to the Court of Appeal.
> Hynes v Swartz: Re Architects Act, [1938] 1 D.L.R. 29 (C.A.)

With the greatest respect to the learned author, the significance of the words "as of right" would not appear to be used by him as they are understood by the writer: indeed, the Judges' Orders Enforcement Act would appear to place definite restrictions upon appeals, for Section 3 of that Statute reads as follows:

> 3. —(1) An appeal shall lie from any such order to the Appellate Division;
> (a) when the right of appeal is given by the Statute under which the judge acts, or;
> (b) when no such right of appeal is given then by leave of the judge making the order or by leave of a judge of the Supreme Court.
> (2) The decision of the Appellate Division shall be final. 1926, c. 26, s. 4

The appeal from a persona, then, would hardly be said to be taken as of right, but rather subject to the granting of leave under (1)(b) where the statute is silent. The Statute also fails to deal with the situation in which the original statute denies the right of appeal.

Our own statute is slightly more explicit. It reads

> 6. No appeal lies from the judgment, order or decision of a judge made under section 2 [i.e., as persona designata] unless
> (a) an appeal is expressly authorized by the Act giving the jurisdiction, or
> (b) special leave is granted by the judge or by a judge of the Court of Queen's Bench.
> [R.S.A. 1955, c. 105, s. 7; 1978, c. 51 s. 28]

However, the Ontario Act specifically blocks any further appeal after submission to the Appellate Division (or Court of Appeal); the Alberta Act does not in terms do so.

No appeal as of right, then, exists without more from a decision by a persona designata: the right of appeal, if any, resides in terms in the Statute or it may be granted by the grace of the persona or of a judge of the superior court. In Alberta the Queen's Bench judge acting in the matter is the person designated to open the door to the Court of Appeal. Meditating upon the word 'special' which modifies the word 'leave', one can only conclude that an unusual circumstance must obtain before such leave will be given. Does the addition of the words 'special' and 'expressly' in our statute have any real effect upon the words 'leave' and 'authorized'? They must have been intended by the legislature to indicate that appeals from a persona are to be entertained with discretion; perhaps only in cases of demonstrated hardship. There is no case on the point of which the writer is aware and semble, we are bereft of guidelines. Other than the specific wording of the statute, what are the criteria which govern the 'special' leave to appeal? At this stage, semble, it would be possible to advance the proposition that the legislature intended access to the Court of Appeal to be severely limited. The writer would, therefore, take vigorous exception to the concluding words in Sanagan's article to the effect that an appeal lies 'as of right', from a persona, by virtue of the Statute.

Indeed, while one may accept, for the time being, the definition of persona designata as one who is appointed to perform a specific task (though, as Sanagen has pointed out in his quotation from Middleton JA, the term is not apt), and this particularly because a judge acting as persona is not really acting much outside of his regular duties; one may accept, then, the definition, but one does not thereby acquire a divining rod with which one may isolate these personae from the judges whom they so closely resemble! One would welcome a rule whereby one might unerringly recognize a persona from among surrounding members of a court as the Maid of Orleans did recognize the Dauphin from the members of his entourage. We still find judicial effort expended, from time to time, in the exercise of making the distinction: a distinction which it has not pleased the Legislature in terms to indicate.

In each Act, then, we must seek for a characterization of our appellate authority. The Ontario Act (which has only changed over the time by virtue of the substitution of 'divisional court' for 'Court of Appeal') does not dictate to the persona the manner of his exercise of the appellate jurisdiction. Presumably the manner of that exercise will be set out in the statute which appoints him. The Alberta statute, however, creates a possible problem which must at least be envisaged, for 'as to proceedings generally' the persona has 'the same jurisdiction ... as a judge of [his] court'. Is this intended to mean that the proceedings will be carried on as a normal proceeding in the court to which the persona belongs? What, we ask, is the effect of a statute which in terms absolves the quasi-court or council appealed from from the rigors of the rules of evidence leaving untouched the question of proceedings upon appeal? This question will be of particular importance in cases in which the statute permits an appeal upon the merits, perhaps even allowing new evidence upon appeal. Must such new evidence (where the statute is silent) partake of the character of evidence receivable in a court, or does the absolution granted to the quasi-court extend to the persona sitting in appeal? The Extra-Curial Orders Act in this matter gives us no assistance but the judgment of Miller J in Alberta Union of Provincial Employees et al v The Queen in the Right of Alberta et al[6] does go some distance in establishing the matter of the record which must be submitted to the court upon appeal. His Lordship held that the Board appealed from was not obligated to provide a written transcript of the taped evidence. This case referred specifically to an application for *certiorari* but His Lordship's words are sufficiently general to apply to any case in which a board appealed from must provide a record to a court of review: what is to be provided is such record as exists in such form as it took when adjudicated upon.

For convenience we must recognize a dichotomy between those appeals confined to law and jurisdiction and those which permit of a reconsideration of the evidence initially adduced. *A fortiori* there is quite another situation where the appeal constitutes a trial *de novo.*

The appeals which are confined to questions of law or jurisdiction may again be divided into (a) those which are launched by leave only and (b) those which may be had as of right. In connection with (a), we have considered the *Macri* case as it relates to the exercise by a single judge of the jurisdiction to grant or not to grant leave to proceed before the court *en banc* and the parameters within which this discretion must be exercised. We decided, after a close scrutiny of the judgment in Hynes v Swartz[7] that there is not, in Alberta, any appeal as of right

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(6) [1978 3 W.W.R. 63; 11 A.R. 1; 85 D.L.R. (3d) 387 (T.D.)
(7) (1938) 1 D.L.R. (Ont. C.A.)

from the decision of a persona designata and therefore that those cases in which appeal from a persona is contemplated would partake of the character of the limited appeal discussed in Macri, the difference lying only in the criteria by which the person granting leave would be bound. Macri sets out for us the manner of exercise by a single judge of the jurisdiction to grant, or not to grant, leave to proceed before the court en banc and the parameters within which that discretion must be exercised.

Among appeals under (b): those which may be had as of right, either by statute or by the practice of the Court, we note many which involve a consideration of professional competence. These range from an appeal to the Court of Appeal by a member of the Alberta Medical Association or by a member of the Alberta Bar from an adverse decision of his self-governing council to an appeal to the Court of Queen's Bench from the decision of a quasi-court convened to regulate the operation of a collection agency. [8] In these hearings the court, upon the basis of a record submitted to it by the council, must hear and determine questions of trade and professional conduct standards. To this end the evidence of the 'brethren' of the subject who practice in competition with him are of necessity the only evidence of which the court can legitimately take cognizance. As Chief Justice Harvey tersely put it [9]

> the principle ... is that "the opinion of his professional brethren

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(8) Collection Practices Act, S.A. 1978 c. 47

(9) Alberta Dental Association v Sharp [1930] 2 W.W.R. 45 at page 48, (Alberta C.A.)

> of good repute and competency" is to be the guide for determining the propriety of the member's conduct, the Court, however, being entitled to consider the reasonableness of that opinion.

It is interesting, in perusing the judgment, to note that upon the original hearing counsel for the respondent

> gave evidence that, from his experience as a barrister and King's Counsel of many years standing, he did not consider the advertisements objectionable as being likely to mislead.

It is heartening to learn that the Chief Justice found this evidence to be of little value

> as the witness showed no qualification whatever for forming an opinion as to what should be deemed to be becoming conduct in a member of the dental profession.

Many professional appeals really involve a hearing de novo and as was pointed out by Stevenson, D.C.J. (as he then was) in Dudley v Alberta Chiropractic Association[10] any reference in a statute to an 'appeal on the merits' authorizes a reversal of the facts found at trial. Some statutes in terms authorize the admission, upon appeal, of factual material additional to the body of evidence received by the trial court. This may have been found by the Legislature to be particularly desirable in light of the fact that, in an appeal from a decision of a commission or a board, the appellant finds himself in the position of fighting the court below.

Four only of the statutes providing for appeals from professional self-governing bodies specifically permit the appeal to be brought in chambers: the Dental Profession Act, the Opthalmic Dispensers Act,

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(10) (1977) 6 A.R. 66

the Pharmaceutical Association Act and the Podiatry Act. It would not appear that there is anything peculiar about the appeal authorized by these statutes that would otherwise set them apart: any reason why they should be heard in a way less formal than other appeals of their kind.

Costs of professional appeals are discussed in a 1971 case in the Alberta court [11] and the citation is simply added hereto to complete the record of judicial pronouncements, for this work will not attempt to deal with costs of applications.

Appeals also include, of course, appeals from decisions of other provincially constituted boards which are formed for the purpose of adjudicating in predetermined areas of subject-matter and to replace the slower-moving courts: the Local Authorities Board, the Planning Board, and so on. The statutes which authorize the constitution of these boards, moreover, recognize in terms the fact that certain large bodies of adjudicative material require a degree of expertise in the adjudicator which cannot obtain in the ordinary fora. Because of the technical nature of the matters being considered by the specialized boards there would appear to exist an increasing tendency upon the part of the legislature to restrict the courts' power of review. That is not to say that the right of individuals to an appropriate hearing has been removed or even limited [12] but consideration of a massive body of

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(11) Alberta Dental Association v Oyer [1971] 5 W.W.R. 369

(12) Except in the case of orders made by the Fire Commissioner.

technical material has been unobtrusively removed from the purview of the federally-appointed bench and placed in the hands of persons who, although they are probably not learned in the law, may be better able than lawyers to consider matters arising in a specialized field. Were matters involving scientific expertise to come constantly before the Court it would be necessary for countless experts in the technical sciences to spend countless hours instructing the personnel of the courts. Practically speaking, therefore, it is no doubt desirable that recourse to the regular courts should be limited because of the nature of the material to be considered. However, to many who cherish their recourse to the regularly constituted courts in the traditional way it may be frightening to note how many tributaries which formerly flowed into the main stream of adjudication have been choked off, leaving only, in respect of large areas of subject-matter, a trickle of appeals upon grounds of 'law or jurisdiction'. The principles which have been discussed above would undoubtedly apply equally to appeals from quasi-courts: that is to say, any appeal from these fact-finding and deciding bodies would have its roots in the statute and leave to appeal, the grounds of appeal and the manner of exercise of the appellate jurisdiction may only be ascertained in the statute's text, with such illumination as we may obtain from the decisions cited supra upon the subject of its construction. This often leaves us, as previously mentioned, somewhat bereft of clear guidelines as to procedure. The Criminal Injuries Compensation Act, for example, provides for an appeal from an Order of the Board limited to a question of law or jurisdiction. The originating document is not prescribed: indeed, there is a specific negation in the section of any right to appeal 'except as hereinbefore provided' and decisions of the Board are not reviewable by certiorari, mandamus, prohibition or any other proceeding[13]. Also although the Act provides[14] that the Lieutenant-Governor in Council may make regulations providing for the procedure to be followed in respect of applications to the Board and in respect of any proceedings under the Act (presumably including appeals) no such regulations have, at the time of writing, been promulgated, and the procedure to be followed under the Act remains a matter for conjecture and for the inventiveness of counsel.

Some appeals partake very much of the nature of other types of proceeding: for example, the appeal provided for in the Companies Act from a decision of the Registrar concerning the name of a Company. The Statute directs that such an appeal may be brought 'before the court' 'by Originating Notice of Motion upon at least 7 days' notice to the Registrar'. The appeal is not limited to the consideration of a name applied for and refused: application may be brought under section 12 from the refusal of the Registrar to change the name of a company at the instance of the applicant, by reason of the applicant's submission that the name in question and its own are so similar as to cause confusion. The appeal, therefore, is akin in nature to a passing-off action[15]

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(13) Act, section 22(2)
(14) Act, section 24
(15) Action Plumbing Ltd v Registrar of Companies (1977) 1 A.R. 296

and there is logic in the prescription in the statute that the application should be launched by originating notice of motion for what would seem to be the preferred vehicle for commencing an application which essentially requires adjudication between two contending parties. It is submitted, however, that in terms the statute, by prescribing originating notice of motion rather than originating summons removes the application from the operation of the Rules of Court and could by a purist be said to rob the proceedings of all the advantages which would accrue to it by virtue of the provisions of Rules 405 to 409, both inclusive. Obviously no such result can have been intended. If we further follow this reasoning along the road to absurdity, we find that the statute, occupying as it does a position of primacy and displacing the Rules, fails to dictate a manner of summary adjudication and leaves the proceedings unprovided for.

The advantages, in matters of this kind, of the procedure in Part 30 are too obvious to require further iteration but Part 30 is ousted by the statute's prescription of originating notice of motion, a proceeding now unknown to the Rules of Court.

The use of the originating notice as a procedural vehicle for appeal is discussed at some length in the judgment of Stevenson, D.C.J., (as he then was) in the Dudley case [16] and in his judgment His Honour remarked

> An originating notice of motion is an unusual procedural vehicle for an appeal. It is, however, a document commencing chambers proceedings and one most frequently employed where there are not

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(16) Dudley v Alberta Chiropractic Association (1977) 6 A.R. 66 at page 67 of the report, paragraph 7

> likely to be serious factual disputes. In form, it incorporates a reference to the evidence which is to be used and I would expect that counsel for the appellant, as applicant, would ordinarily refer to the evidence on which he sought to rely. That was not done here and while I do not fault counsel I would hope that in future the appellant would refer to the evidence on which he relied so that counsel for the respondent could determine whether or not there was an issue on the facts and make representations accordingly.

After discussing the question of whether or not the appellate tribunal is authorized, under the statute, to proceed de novo, considering upon the appeal, facts additional to those advanced at the trial

> I find the same principle in English cases allowing appeals to the Court. There is one significant distinction in English cases and that is that the Rules of Court dealing with such matters authorize the procedure as well.

These last remarks of His Honour point up the fact that neither in the statute nor in the Rules do we, in Alberta, find a body of rules universally applicable to the summary procedure. His Honour makes a helpful suggestion in the Dudley case and although it is submitted that beyond filing and serving the affidavit upon which he relies, the applicant seldom, contrary to what is said in the judgment, adverts in detail to the grounds of the appeal, it is easy to visualize an originating notice which does, in fact, set out the grounds of the application as well as a summary of the material upon which the applicant will rely.

Notwithstanding that it would be possible to draft a suitable originating notice, it is submitted that where an appeal is contemplated, it would be helpful if the rule were that one might proceed by notice of appeal, which notice would incorporate the grounds of appeal for the purpose, as His Honour points out, of clarifying the issue.

CHAPTER 5

II - APPLICATIONS FOR ORDERS DECIDING BETWEEN CONTENDING INTERESTS

For the purposes of this discussion these applications are labelled 'adjudications': a term not blessed by precedent and employed, in the absence of any better, to describe proceedings for the summary settlement of issues between contending parties. Contrary to the general rule enunciated by Stevenson J. in the Dudley case [1], these applications not infrequently involve a dispute both as to facts and law. In spite of this the legislature has sometimes seen fit to authorize a time- and money-saving procedure which is intended to assist the plaintiff to prosecute his claim with a dispatch not available to the ordinary litigant. The procedures prescribed under the Builders' Lien Act and those set out in the Woodmen's Lien Act, though initiated by Statement of Claim, partake of the summary character of this category and should properly be considered among the instances of summary procedure.

In most cases in which adjudication is prayed for the statute either prescribes that the application shall be launched by originating notice of motion or originating notice, or it is silent, which would direct

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(1) Dudley v Alberta Chiropractic Association (1977) 6 A.R. 66 quoted supra at page 52 and ff

the applicant to Part 30. We will assume that originating notice of motion is to be equated with originating notice. The Dower Act and the Execution Creditors Act, however, prescribe notice of motion or notice in writing, which would appear to indicate an ad hoc approach to the procedure: particularly the use of the words 'notice in writing' which does not technically admit of identification. Generally speaking, however, one may say that an originating notice, a notice of motion or an originating notice of motion are suitable in form for the launching of an application to the court for a summary decision between conflicting points of view: such points of view and the facts upon which they are based to be set out in the notice itself and verified by the affidavit of the party applying or respondent, upon which affidavit there is the right to cross-examine.[2]

The chief concern of counsel, semble, in launching an application of this kind, must of necessity be the question of whether the court will hear the application so advanced or whether the judge will exercise a discretion to refuse the application out of hand and direct the parties to proceed by statement of claim. It may be that the judge does not always have the discretion to refuse to hear the application in a summary way. The Administration of Estates Act, section 11(3) provides that where two or more applications (for probate, administration or guardianship) have been filed, the judge shall adjudicate between them and shall give directions as to which application is to be proceeded with.

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(2) Rule 314 of the Supreme Court Rules

At the same time, however, the Surrogate Court Rules provide

> 25. (1) All contentious business shall be begun by way of originating notice before the judge in chambers.
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> (2) "Contentious business" means
>
> ....
>
> (b) proceedings in which the right to obtain or retain a grant is in dispute
>
> ....
>
> (3) On the return of the notice the judge
>
> (a) may hear the matter in a summary way on the affidavits filed or on viva voce testimony or
>
> (b) may direct an issue to be tried for the purpose of ascertaining any facts in dispute
>
> and may give directions respecting the parties to such issue, examinations for discovery, production of documents or other steps in the cause leading to the trial thereof as in an ordinary action having regard to the amount or nature of the issues involved. [Alta. Reg. 167/73]

The Administration of Estates Act, then, provides for a summary procedure in a specified instance: where there is more than one application for a grant of administration. The Surrogate Rules, however, would appear to leave to the presiding judge a discretion upon an application by a contender, to withhold a decision in respect to the grant and compel the parties to launch a full-dress action to settle the question of who shall have the right to administer. The Statute, however, being paramount, it must surely oust the provisions of the Rule and there may be, contrary to the provisions of Rule 25, an absolute right to approach the Court for directions whereupon the court shall inquire in a summary way, thereafter adjudicating between the contending applicants as to which application shall proceed. It is interesting to note that from an Order granted under 11(3) no appeal will lie. [3]

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(3) Administration of Estates Act, RSA 1970 c 1 section 11(5)

Another simplified adjudicative procedure is prescribed by Section 43 of the Administration of Estates Act. This section provides that a claimant against an estate, having been served with a notice of contestation of claim, may apply under a summary procedure 'on motion' and the judge 'shall' decide the matter after hearing the parties and their witnesses. The framers, semble, envisioned a claimant presenting to the court (1) a statement of his claim, (2) a copy of the notice of contestation, (3) an affidavit in support of the claim and (4) a document called in the statute a 'motion', whereupon presumably the judge would entertain viva voce evidence in addition to the material filed in affidavit form and decide as to the merits and the amount of the claim in dispute. Notwithstanding Section 43, however, the judge by 43(5) retains an option: he may direct an issue to be tried. Unfortunately there is no Alberta case reported on the point which could clarify subsection 43(5) and answer the question, may the judge of his own motion direct an issue or must such an order, in view of the 'shall' in section 43(2), rest upon an application by one or other of the parties to the controversy?

In Attorney-General v Emerson [4] the English Court of Appeal discussed the effect upon a legislative use of the word 'may' of an established practice, the repetition of which, it was contended, constituted a gloss upon the word 'may' giving it the context of 'must'. The Court said that the word is potential only and (per Lopes, L. J.)

It confers a discretion upon the Court or judge asked to make

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(4) (1890) 24 Q. B. D. 56 at page 59

> an order such as is asked for in this case. It would be interfering with and limiting that discretion if we held that it was an established practice in every case to make the order. As to this particular case, there are special circumstances which justify us in granting the application.

Per Lord Esher, M.R.

> In all the rules the word "may" has been held to mean "may or may not". It has been held to give a discretion which is called a judicial discretion, but is still a discretion.
>
> ....
>
> The Courts have no power to alter the effect of the rule....

The point is clearly stated. "May" confers a power simply. However, semble, whether there is a duty to exercise the power depends upon the context: and Lopes, L.J., in In re Eyre and Corporation of Leicester[5] took a view rather divergent from that which he had held in Emerson:

> I think that in a case like the present, where there is a dispute clearly within the submission and a failure to concur in the appointment of an arbitrator, and the proper notice has been given, the word "may" is equivalent to "must".

And Kay, L.J., concurring, expressed himself in the following terms:

> I desire, however, not to bind myself with regard to the question whether the word "may" in the section may not in certain cases give a discretion to the Court. I conceive that cases might arise where it would be necessary to exercise some discretion. I understand that in this case it is admitted that some of the matters in dispute were clearly such as came within and ought to be referred under the submission. In such a case I do not think that the Court would have a discretion to say that it would not entertain the application, assuming, of course, that all the necessary preliminary steps had been taken -- that is to say, that there had been a sufficient notice within the section, and no appointment had been made within the seven days. In such a case I do not think the Court ought to exercise any discretion, if it has any. .... I therefore agree that for the purposes of this case the word "may" must be treated as equivalent to "must". But I do not wish to hold that in every case "may" in

(5) [1892] 1 Q.B.D. (Law Reports) 136

this section is equivalent to "must".

A similar point was considered by our own Court of Appeal in *Re Buzunis* [6] and the Court concluded that, even in the face of the wording of the statute, "may", in that case, meant "must". The *Municipal Government Act*, as the statute then read, provided:

> (2) Upon hearing the application and such evidence, either oral, or by affidavit, as he requires the judge
> (a) may, by order, declare the member to be disqualified, or
> (b) may refuse the order.

The headnote reads

> Appellant purchased a residential lot from the town of which he was mayor, and failed to follow the procedure laid down in s. 29(1) of The *Municipal Government Act* because he and other officials were unaware of it. Proceedings were taken under s. 32 of the Act and he was found to have been disqualified to continue in office. It was argued on his behalf that the use of the word 'may' in s. 32 conferred on the trial judge a discretion.
> *Held*, the appeal should be dismissed; in the light of the intent and purpose of the *Municipal Government Act* the word 'may' in s. 32 was required to be construed as imperative, and where circumstances entailing disqualification were shown to exist the Court was obliged to make the declaration of disqualification. Nor could the forfeiture of office be relieved against. (Authorities cited).

The Court of Appeal, therefore, took the position that, having found as a fact the breach of the Section, the consequential order was no longer a matter of discretion. The Legislature immediately amended the Act to grant, in terms, a discretion to relieve from the consequences of such a breach, where there is no conscious departure from the rule. [7]

The above discussion will suffice to illustrate that the matter of judicial discretion is by no means established beyond controversy. One

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(6) [1975] 1 W.W.R. 233 (Alberta Supreme Court, Appellate Division)
(7) S.A. 1975(2) c. 69 s. 11 quoted at Sched II page 120 *infra*.

additional point, however, deserves mention in the context of the words 'may', 'must' and 'shall'. What of the situation in which the power appears to be bestowed upon the applicant? Where a Rule says that an applicant 'may proceed' in some summary manner, is it not logical to conclude that the choice of process rests with the initiator of that process, and, given compliance with the Act, the judge hearing the application cannot then arbitrarily -- unless the statute specifically authorizes him to do so, decline to hear the application in a summary way and direct the applicant to issue a statement of claim.

One would think that this might be the case but in the light of the judgment of Justice Sinclair in Ulster Petroleums[8] it is submitted that an attempt to argue such a line in an Alberta court would not likely succeed.

Rule 413(c) of the Supreme Court Rules provides that the applicant may proceed by originating notice for the determination of any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person. In the Administration of Estates Act, however, we find quite another procedure.[9] Normally, a claim against an estate is simply advanced by statutory declaration and if no notice of contestation is received the claim is taken to be accepted. If the claim is rejected and the claimant so advised under Section 43 of the Act, the procedure set out in section 43 is set into motion and the court may either adjudicate upon the controversy in the summary fashion outlined in the section or direct an issue. This leaves us with a question as to

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(8) See page 7, supra
(9) See Sched II, page 6 infra

what, if anything, is the function of Rule 413(c).

Another proceeding authorized by the Administration of Estates Act which can certainly be classified as an application for adjudication between two contending parties, is that by which the applicant proceeds, with leave, upon an Administration Bond as representative of all those persons for whose protection the Bond was granted. Where the conditions of the Bond have been broken by the Administrator 'any person interested in the estate' may, with leave of the court, institute proceedings and recover as trustee for all persons interested. The section envisages, first, an application for leave to bring the proceedings: the section does not tell us how such an application is to be launched, nor what supporting material the court will require. The vehicle is not of prime importance: what is important, it is submitted, is the essence of the application which would appear to fall squarely within the principle enunciated in the Macri case[10] where Clement, J.A., set out

> .... he [the judge hearing the preliminary application] is to exercise a properly informed preliminary judgment on an application that meets the requirements of [the section] upon which his jurisdiction rests.

Leave having been granted, the applicant proceeds by Originating notice of motion[11] to enforce the conditions of the bond. The respondent, presumably, is the bonding company or other guarantor. Nothing in the Statute provides that the Administrator shall be made a party to the proceedings but Rule 415(1) of the Rules of the Supreme Court lays down

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(10) see pp. 40 and 41, supra
(11) Administration of Estates Act, section 35(2)

that when proceedings under Part 34 are taken,[12] all of the executors and administrators of the estate or trustees of the trust shall be parties to the proceedings: those who are not applicants being named as respondents. Query, does this provision apply to an application under Section 35(2) of the Act? Logically, it would seem that it ought so to do, but the Rules do not in terms so state. Since the default which gives rise to the proceedings is that of the trustee or administrator, it would appear to be inconceivable that he should not be given notice and an opportunity to appear. In the alternative, it is quite possible that substitutional service will have to be sought. Query, too, whether the bondsman against whom judgment is signed in such a proceeding may, by the same proceeding, have judgment over against the defaulter. The question of judgment over must have been in the contemplation of the framers for by Rule 417(3) the Court may give a judgment which affects the rights of persons not parties to the proceedings and there is even a prescribed form of notice (Form H) which serves to advise a person affected by a proceeding to which he is not a party, of the effect upon him of the judgment or Order, advising him that he may, if he chooses, within 14 days apply to vary the order. In order to cobble together this procedure, however, it is necessary to go from the Statute to the Rules and back again to the Statute. While most of the points are covered, some are contradictory and the procedure is nowhere clearly set out. Unfortunately no Alberta cases are reported. Pleadings in such an action are discussed

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(12) ["Administration and Similar Proceedings"]

in Digest of Ontario Case Law [13]. The very fact that no cases are reported: either under the Administration of Estates Act dealing with the applications above referred to, nor under the Surrogate Rules nor yet under the Supreme Court Rules, would lead one to speculate as to whether the profession may not have found the concurrent and sometimes conflicting directions so confusing as to prefer not to attempt to avail itself of the summary procedure and the very real advantages which it presents.

Among the applications which have been assigned by the writer to the second category: adjudication between contending interests, 15 of a total of some 34 are left to be proceeded with under Part 30; 10 of the total are prescribed to be commenced by originating notice or originating notice of motion; 3 simply by notice of motion and 6 by a notice, the text of which is prescribed by the statute. There would not appear to exist any real difference between the applications which are brought by one method and those which are launched in another.

In the concluding chapter of this work the writer will contend for a slightly enlarged and amended Part 30 which would permit of the launching of an application in the manner there set out: either ex parte or (at the option of counsel) upon 10 days' notice to the respondent. At the hearing of the application the judge in his discretion may grant the order prayed for or else, should he consider that it is desirable that some person other than the respondent who has been served should have

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(13) Butterworth's, vol. 1, commencing at page 849 to 865.

notice: or should the judge wish to hear further evidence or to permit cross-examination upon affidavit, such directions can then be given. Such a procedure, however, would eliminate a number of chambers applications since careful preparation by the applicant might frequently result in his obtaining his Order upon the first attendance.

It is submitted, also, that a procedure which provides that the applicant shall proceed by originating notice of motion served upon 'the respondent and such other persons as the court shall direct' results almost inevitably in at least one unnecessary appearance in chambers with the inconvenience attendant upon such attendance.

The summary procedure prescribed by the Builders' Lien Act belongs to this category but because it stands alone in respect of its practice, it has been reserved to another chapter denominated herein 'Appendix 1'.

CHAPTER 6

III - APPLICATIONS FOR PEREMPTORY ORDERS

These are applications for an order enjoining a party, at the instance of another, aggrieved party, from doing an act usually forbidden by a statute or regulation or peremptorily directing the respondent to perform a duty which, it is alleged, he owes to the applicant. The applicant is saying to the court 'the respondent is performing or threatening to perform an act which is improvident or illegal and which will damage me and I pray this court to direct him to desist'; or, again, the applicant is saying 'the respondent has failed to perform a duty which he owes to me and I pray this court to direct him to perform it'. The peremptory character of the application is the essential factor which distinguishes it from a request for adjudication. In this section also have been included summary applications under the Rules for orders in the nature of the prerogative writs.

It may be that in lumping together all peremptory orders, this work has served in some measure to confuse rather than to clarify the practice and perhaps it would be useful to create two sub-categories: first, the injunction proper which contemplates an order to refrain from doing an act and second, the order to perform a duty. The second category is the smaller, for the court is reluctant to grant a positive direction and has traditionally refused to order a series of acts, which would entail a measure of necessary supervision by the court.

There is precedent for combining into a single category all of the peremptory orders including orders in the nature of prerogative writs. F.A. Brewin [1] speaking of mandamus, certiorari and prohibition, had this to say:

> These remedies are interrelated and sometimes overlapping and have much in common. They are the means by which the court exercises a supervisory jurisdiction over inferior and statutory tribunals and keeps them within the limits of the powers conferred on them by statute ... [or] ... orders a statutory tribunal or other person to carry out the duty imposed on it when it fails or declines to do so. [1]

The law of Ontario in respect of remedies generally has been carefully collected in the 1961 Law Society of Upper Canada Special Lectures [2] where it awaits editing by a member of the Alberta Bar for the use of the profession here. The principles enunciated by the Ontario Court of Appeal, while illuminating, are far from consistent and must of course be read with an eye upon the pronouncements of our own Court in that behalf.

There is further precedent for viewing narrowly the traditional

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(1) Law Society of Upper Canada Special Lectures, 1961: "Remedies"
- Injunction and Mandatory Injunction (including interim orders)
W.B. Williston, Q.C. page 81
- Declaratory Judgment
Allan Findlay, Q.C. page 183
- Mandamus
F.A. Brewin, Q.C. page 273
- Prohibition, Certiorari and Quo Warranto
B.J. MacKinnon, Q.C. page 289

(2) Ibid.

categories. Chief Justice Milvain in the Mount Royal College case [3] refused to place the prerogative writs in a sacrosanct pigeon-hole beyond the reach of comment. His Lordship says of an application for an 'order in the nature of certiorari':

> At this moment I am moved to express my view that there seems to be a great deal of misunderstanding as to what certiorari is. This misunderstanding is carried into our Rules of Court where it is stated in R. 738 and subsequent rules that:
>
> > 738. An order in the nature of ... certiorari ... may be granted.
>
> I am sure, historically, [that] a writ of certiorari was issued by a superior court directing an inferior one to bring forward its record for scrutiny. I am equally sure no superior court has any desire to scrutinize any record out of mere curiosity. The desire to scrutinize comes only in relation to an application for the order of prohibition, mandamus to quash or some other relief. Therefore certiorari is used merely as an aid to a motion rather than as a motion in itself.

From the point of vantage of this enlightened analysis one may proceed, it is submitted, to consider and study as one genus, applications for orders of a peremptory nature whether their fons et origo is shrouded in the mists of antiquity wherein reside the sources of British practice or whether, in the alternative, the authority for their existence is set out in the Statutes of Alberta or in the Alberta Rules of Court. There ought to be no magic in a definition just because it contains a term couched in dog Latin or antediluvian French.

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(3) Board of Governors of Mount Royal College v Board of Industrial Relations of Alberta and Mount Royal Non=Academic Staff Association [1974] 6 W.W.R. 647 at page 648 (Milvain, Chief Justice of the Trial Division, Alberta Supreme Court)

Under the Administration of Estates Act there is provision for an application to the court by originating notice of motion 'and upon such notice as the judge may direct' [4] for an order restraining any person from intermeddling with the estate of a deceased. This application is, in character, an application for injunction but it is not clear whether, because the statute does not in terms so denominate the order, the principles applicable to injunction may be said to obtain.

The principles which govern the court's consideration of an application for injunction as set out in Ashburner's Principles of Equity [5] were quoted with approval by Hudson, J. in Massie & Renwick Ltd v Underwriters' Survey Bureau [6] and His Lordship thus endowed the passage with the imprimatur of our ultimate court of appeal:

> Where the court has jurisdiction to grant an injunction the question whether it will grant it or not is a question of discretion but ... "every threatened violation of a proprietary right which, if it were committed would entitle the party injured to an action at law entitles him, prima facie, to an injunction and the onus is on the defendant of rebutting the presumption in favour of an injunction by showing that damages will be adequate compensation to the plaintiff for the wrong done him or that on some other ground he is not entitled to equitable relief."

The shifting of the onus provided for in Massie & Renwick must be read in the light of the judgment of our own Appellate Division in Calgary v Reid and Vincent [7] which warns that

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(4) Administration of Estates Act, RSA 1970 c. 1 s. 32(1) [Sched. II page 3]

(5) Ashburner's Principles of Equity, 2nd Ed., 1933 at page 343

(6) [1937] 2 D.L.R. 213

(7) Re: 2103 and 2116 Hope Street; Calgary v Reid and Vincent (1958-59) 27 W.W.R. 193; (1959) 17 D.L.R. (2d) 198.

> in the case of a statutory injunction the applicant must show that the case comes squarely within the statute before the court has power to make a decree.

The term 'statutory injunction' does not appear to be contained in any glossary of words and phrases. One can only conjecture that His Lordship referred to an application for an order in the nature of an injunction which is authorized by statute and the principle, therefore, semble, must refer to any one of the applications contained in this category. The first task of the applicant, then, must be to bring himself squarely within the statute: and then at that point the onus will shift, upon the authority of Massey & Renwick [8].

The Rules of Court would appear to contemplate that an application for an injunction will normally be made by way of an interlocutory application in an action, rather than by application launched for such a purpose alone. The statutes listed in Schedule I under category 3, however, severally authorize applications in a summary way for orders in the nature of injunction, and they authorize these applications to be brought by means of a variety of initiating vehicles: the Administration of Estates Act, as mentioned above [9], contemplates an order enjoining any person from intermeddling in an estate; the Individual Rights Protection Act [10] authorizes the Attorney-General, presumably at the instance of the person affected, to seek an injunction restraining the respondent from conduct repugnant to the terms of the Act. Under this Act the application is brought by originating notice of motion.

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(8) [1937] 2 D.L.R. 213; quoted supra at page 66
(9) R.S.A. 1970, c.1, s.32(1); Sched II page 3
(10) Individual Rights Protection Act S.A. 1972 c.2 s.24(1) Sched II p.82

For the purpose of this discussion in this group belong an application by a water user for a declaration that a member of the Board of Directors for an Irrigation District is not qualified to serve upon the Board [11] and an application under the School Act relating to the presence upon the School Board of an unqualified trustee. [12] These latter two applications are similar in procedure and in effect but the Irrigation Act prescribes an originating notice of motion and the School Act permits an *ex parte* application which presumably provides an occasion for obtaining the court's directions as to service.

Examples of positive, rather than negative, orders are, applications under the Builders' Lien Act for an order directing an owner, contractor, etc., to allow the applicating to inspect statements and agreements relating to the project in respect of which he wishes to file, or has filed, a lien[13]; the statute gives the applicant the right to view these documents and as a further measure of security for the lien claimant, gives him the right to apply for this order. Under the Companies Act an Order can be sought appointing an inspector to investigate the affairs and management of a corporation [14] and the order comprehends a direction to all persons to make available to such inspector such records as he shall require. Under the Irrigation Act the application is to be launched by originating notice of motion. The Companies Act prescribes no vehicle and the Alberta Corporations Manual advocates proceeding under Part 30.

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(11) Irrigation Act, s. 35 and see Sched II page 91
(12) School Act, s. 35 and see Sched II page 148
(13) Builders' Lien Act s. 24 and see Sched II page 20
(14) Companies Act, s. 160(1) and see Sched II page 41

In Alberta the Judicature Act specifically provides that an Order of Mandamus may be granted by interlocutory order of the court and the rules of Court 437 to 439 apply to an interlocutory application in the course of an action. In Alberta, however, it must be borne in mind that Mandamus proceedings are of two types:

> There are two kinds of Mandamus proceedings [in Alberta]. One by motion under Rules [739 to 741] and one in an action under Rules [437-439]. Section 26 [sic] [15] of the Judicature Act applies only to an action. [16]

Confining ourselves (as we must) to the Mandamus application brought by motion, the procedure for which is set out in Rules 739 to 741, it is submitted that the source of the Court's power to grant mandamus in a summary proceeding must then lie in the provisions of Section 32 of the Judicature Act which sets out that

> 32. In every civil cause or matter commenced in the Supreme Court law and equity shall be administered by the Court according to the following rules,
>
> (a) if a plaintiff or petitioner [17] claims to be entitled
>
> ....
>
> (iii) to any relief founded upon a legal right
>
> the Court shall give to the plaintiff or petitioner such relief as would be given by the High Court of Justice in England in a suit or proceeding for the same or a like purpose. [18]

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(15) the numbering of the section is a misprint in the judgment; the reference is obviously to R.S.A. 1942 Vol. II (pp 1433/1434), c.129, s. 36(h) which is reproduced in part in R.S.A. 1970, c. 193 s. 34(9)

(16) per O'Connor, J.A. in Rex ex rel Mikklesen and McGaughey v Highway Traffic Board, [1947] 1 W.W.R. 342 at page 348.

(17) Note that "petitioner" in the Act is defined as including 'every person making an application to the Court either by petition, motion or summons otherwise than as against a defendant'

(18) R.S.A. 1970, c. 193

The dual aspects of mandamus in Manitoba were discussed by Justice Galt in the Frankel case[19] and His Lordship concluded that, because the draftsman did not sufficiently distinguish the two distinct circumstances under which mandamus might be sought, he had initiated into the Rules a measure of confusion which His Lordship deplored. At page 408 of the Judgment, His Lordship explained

> The rules relating to the granting of a mandamus are Rules Nos. 875 to 888 inclusive. Prior to these rules the English procedure in force in Manitoba provided for two separate kinds of mandamus; first, the prerogative writ, which did not require the bringing of any action; and second, a mandamus to be obtained by action pursuant to the Common Law Procedure Act, 1854, and subsequently amended by the Judicature Act.
>
> No argument was addressed to me with reference to these separate forms of Mandamus, as the parties seemed to consider that the order made by Macdonald, J., was conclusive as to the right of the applicants to frame their motion as they have done.
>
> I find it difficult to give effect to the procedure adopted by the applicants for the following reasons:
>
> Rule 875 enables the plaintiff to issue a statement of claim asking for a mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. Rule 877 provides that no writ of mandamus shall hereafter be issued in an action; but a mandamus shall be by a judgment or order, but shall have the same effect as a writ of mandamus formerly had. Rule 879 provides that nothing in the preceding rules contained shall take away the jurisdiction of the court to grant orders of mandamus, nor shall any order of mandamus issued be invalid by reason of the right of the prosecutor to proceed by action for mandamus; but in all cases the claim for a mandamus shall be proceeded with by action under the preceding rules, unless leave is granted by the court or judge to proceed otherwise.
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> Rule 885 provides that in all cases in which application for mandamus is made by motion the application for the said order may be made to the court on affidavit upon leave being granted as provided in Rule 879, and upon notice in the ordinary manner to any person

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(19) Frankel v City of Winnipeg et al. [1912] 3 W. W. R. 405; per Galt, J., in King's Bench chambers.

> who may, in the opinion of the court or judge, by affected by the order, if made.
>
> The draftsman of the above rules appears to have had a vague idea that the remedy previously given by prerogative writ of mandamus was to be preserved in our procedure, but modified by enabling the applicant to move by way of notice of motion in lieu of the usual order nisi, and to obtain the requisite relief by an order instead of by the usual writ. The two modes of relief, widely differing in their incidents and applicability, are confused in our present Rules.
>
> Under the former practice the proper procedure was to apply to the court for an order nisi in the name of the Sovereign ex relatione the applicant against the defendant. An instance of this may be seen in Regina ex rel. Pacaud v Dubord, 3 M.R. 15. I see no reason why the parties to a notice of motion (if that be now the proper method) should not be the same as under the former procedure by way of order nisi. That is to say, the motion should be on behalf of the Sovereign ex rel the prosecutor. The motion as framed is therefore improper.

His Lordship came to the conclusion that the sovereign's name should properly appear in the style of cause: a rule which seems to have been tacitly dropped, but, semble, never formally rescinded. Our own Rules of Court deal with the prerogative writs in an ad hoc fashion -- with references to the procedures scattered throughout the volume and much of the same confusion created as is complained of by Galt, J. Indeed, we would appear to hearken back in a somewhat selective fashion to the English practice, adopting some of the principles which have been hallowed by precedent and mystifyingly shedding others. It would appear that in order once and for all to lay to rest the procedural appanages of courts which have long ago been amended and consolidated out of existence, some student with a love for digging into antiquated authorities will have to search out each and every one of the 'principles' pertaining to each of these applications to ascertain what, if any, is the relevance of each of these 'principles' today. The following is submitted simply as an illustration of the necessity for such an undertaking.

Historically, as mentioned supra, the remedy of mandamus was granted in certain limited circumstances only. Initially a mandamus lay only to compel the performance of a ministerial duty [20] but semble the rules have been expanded upon occasion to accommodate situations in which no other remedy is open to the applicant, even where the case does not fall strictly within the parameters of the classical remedy [21]. Although the list of circumstances for the granting of an order in the nature of mandamus has been expanded and contracted from time to time by the operation of the courts, the following are generally accepted as principles which govern the application:

(a) the writ ought to be used when the law has provided no specific remedy and justice and good government require that there ought to be a remedy for the execution of the common law or the provisions of a statute [22]

(b) the respondent must have a legal duty to perform the act for which mandamus is prayed

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(20) per Best, J., in his dissenting judgment in The King against The Mayor, Recorder and Aldermen of the Borough of Fowey (1824) 2 Barn. & Cress. 596; 107 E.R. 501 at 505

(21) Pecover v Bowker and Governors of University of Alberta (1956-57) 20 W.W.R. 561; (1957) 8 D.L.R. 20

(22) In re Commercial Taxi and Highway Traffic Board [1950] 2 W.W.R. 289; [1951] 1 D.L.R. 342, affirmed (1951) 1 W.W.R. (N.S.) 465; [1951] 2 D.L.R. 506.

(c) the applicant must have a right to its performance, that right being of a public, rather than of a private, nature. [23]

The Frankel case is given as the authority for the principle that the right sought to be enforced must be of 'a public, rather than of a private' nature: but the judgment in Frankel simply asserts that principle and does not enlarge upon it, or define it. Seeking the definition of 'public duty' we find that this term is not defined in the context of a mandamus application: but only for the purposes of the Public Authorities Protection Act (1893). What, then, is a 'public duty', in contradistinction to a duty of a 'private' nature?

In R v Bank of England [24] an application was brought by a shareholder of the bank for a mandamus to compel the directors of the Bank to produce their accounts of profit and loss and to divide their profits, if profits there should be found to be. Chief Justice Abbott characterized the application as follows:

> It is, in effect, an application on the behalf of one of several partners to compel his co-partners to produce their accounts of profit and loss, and to divide their profits, if any there be. The examination of the accounts of a trading company may be effectually entered into in the Court of Chancery; but this Court [the Court of Queen's Bench] is a very unfit tribunal for such a subject.

And Justice Bayley added

> The Court never grant(s) this Writ except for public purposes and to compel the performance of public duties. This is an

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(23) Frankel v Winnipeg (City)(1912) 3 W.W.R. 405; 22 W.L.R. 597; 23 Man R. 296; 8 D.L.R. 219.

(24) (1819) 2 Barn. & Ald. at p. 622; 106 E.R.

> application, at the instance of one of several partners in a trading company, to compel his co-partners to divide their profits: but that is a mere private purpose, and presents a fit subject for enquiry on the other side of the Hall. There is no instance in which the Court(s) have granted a mandamus to a trading corporation: and that being so, I think that we should not now grant it for the first time. (The italics are mine)

It is clear from the above that the term 'public duty' originally had reference to a duty owed to the public rather than specifically and personally to the applicant and this view is borne out by the words of Justice Galt in the Frankel case where he points out that

> the motion should be on behalf of the Sovereign ex rel, the prosecutor.

It is also clear that the Writ was commonly issued in the Court of Queen's Bench and not in Chancery. [25] In view of the fact that the Judicature Acts have intervened between the Bank of England case and the present day, it may well be that the distinction between 'public' and 'private' duty in this context is one which might be permitted to go the way of the distinction which at one time forbade the issue of a mandamus to compel only the performance of a ministerial duty, which distinction was dropped in the 18th century. [26]

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(25) R v Bank of England (1819) 2 Barn. & Ald. at p. 622; 106 E.R.

(26) Per Best, J., in his dissenting judgment in The King against The Mayor, Recorder and Aldermen of the Borough of Fowey (1824) 2 Barn. & Cress. 596· 107 E.R. 501 at 505:

> If this application had been made a century ago, it would not probably have been granted, for at that time a mandamus was held to lie only to compel the performance of a ministerial duty: but modern cases have gone much further, and a mandamus will now lie for the performance of any public duty.

All of this leads to the inevitable conclusion that the criteria for this, as for all remedies, require searching examination: that it is desirable that the courts not piously reiterate rules, the foundation for which has long ceased to be and, in the same vein, if we consider as a class applications for orders of a peremptory nature, whether the authority for them lies in the common law and custom or in the text of a statute or in the Rules, it may be that we will emerge from our study in a position to develop a new and improved procedure. It may be that a new procedure would be more in accordance with the exigencies of present-day practice than is the present hodge-podge of diverse vehicles which comes down to us through the cases and as a result of consideration by the bench of each individual application upon a restricted, ad hoc basis.

The Rules provide that

Mandamus

Judgment or order 437. A writ of mandamus shall not issue but a mandamus may be granted by judgment or order on motion and the judgment or order has the same effect as a writ of mandamus formerly had.

Claim in statement of claim 438. The plaintiff may claim a mandamus in his statement of claim, either alone or together with any other relief.

Power of court 439. The court may by judgment command the defendant either forthwith or on the expiration of such time and upon such terms as the court may direct, to perform the duty in question.

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Order not writ shall issue 738. (1) An order in the nature of *mandamus, prohibition, certiorari, habeas corpus* or *quo warranto* may be granted upon application by notice of motion returnable before the court.

(2) The writs of *mandamus, prohibition, certiorari, habeas corpus* and *quo warranto* shall not be issued, but all necessary provisions shall be made in the judgment or order.

Service of notice of motion

739. (1) The notice of motion shall be served upon every person who appears to be interested or likely to be affected by the proceedings.

(2) The court may require the notice of motion to be served upon any person not previously served.

(3) Where it is sought to quash a judgment, order, warrant or inquiry, and in all applications for an order in the nature of prohibition, notice of motion shall also be served at least seven days before the return date thereof

(*a*) upon the Attorney General, and

(*b*) upon the person making the order or holding the inquiry.

(4) Any person not served with the notice of motion may show that he is affected by the proceedings and thereupon may take part in the proceedings as though served.

Appeal

740. An appeal lies from the order of the court to the Appellate Division.

Direction by a judge

741. Any direction required to give effect to an order of the Appellate Division may be made by a judge of the Appellate Division.

Mandamus

Mandamus

751. No order in the nature of *mandamus* shall be granted unless at the time of the application an affidavit is produced by which some person deposes that the application is made at his instance as prosecutor and the name of that person shall appear as the person at whose instance it is made.

Mandamus issued by the court

752. No action or proceeding shall be commenced or prosecuted against any person in respect of anything done in obedience to a *mandamus* issued by the court.

Effect of order

753. The order or judgment may compel the performance of the duty forthwith or upon the expiration of a fixed time or subject to specified terms.

Justice Milvain's comments in respect of the 'order in the nature of certiorari' have already been quoted [27]. The Writs have been laid to rest. What now remains is a class of orders whereby the court, in certain circumstances, will forbid a process or compel a process at the instance of an applicant: either in a full-dress action or in a summary proceeding launched for the purpose. The word certiorari simply signifies that, where the error of the lower court appears upon the fact of the record, a superior tribunal can interfere to correct that error and as Justice Milvain has pointed out, the remedy itself may be mandamus to quash or prohibition or some other relief. It might be salutary to avoid using the traditional terminology for much of our trouble seems to hearken back to these very terms. The reason for this is not far to seek, for the incidents which became associated with the old terms have in many cases ceased to be of significance, pursuant to alterations in the composition of the courts.

It has, for example, been pointed out above that the reason why public duties only were enforced by mandamus lay in the circumstance that mandamus was pleaded for in the King's Bench whereas an order directing a respondent to fulfil a duty owed to the applicant as an individual, rather than as a member of the public, was sought, according to the practice of the court, in the Chancery Division, which latter body exercised a jurisdiction in personam compelling the

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(27) supra, page 73

conscience of the respondent. While it is true that the waters of the stream of equity and that of law do not mingle, it is equally true that they are now dispensed from the same source and it is submitted that the distinction drawn in R v Bank of England [28] has now ceased to have any material significance and would not obtain, if the application were brought today.

It is submitted that there is no good reason why the notice of motion, rather than the originating notice, should be prescribed as the means of applying for orders in the nature of the prerogative writs, and this is especially true in circumstances in which it is sought to quash a judgment, order, warrant or inquiry: for in such case the Rules provide for seven days' notice [29] and there would appear to be no real advantage in the simple motion over the originating notice, in respect even of time.

There would seem to be no good reason why these applications, together with other summary applications, could not be made by the method hereafter suggested [30]: one which combines, it is urged, the best features of Part 30 with the additional advantage of permitting the applicant, in the proper case, to appear once and once only to obtain his remedy at a saving of time to the applicant and to the court.

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(28) supra, page 82

(29) Rule 739(3) quoted supra at page 84

(30) See infra, Chapter 10 at page 113

CHAPTER 7

IV - "SHOW CAUSE" APPLICATIONS

These, denominated 'show cause' applications, chiefly in the light of the Master's judgment in Sanders v Nousek,[1] are applications in which the applicant serves upon the respondent a notice calling upon him to show cause why the order applied for should not go. There is only one reported instance of this case having been followed but the principle therein enunciated would appear to have gained general acceptance and there is always danger in failing to word one's motion in accordance with the rule or the statute. If this is not done the applicant may fail upon the ground that he has not in terms warned the respondent that unless he does appear and does show cause why the order prayed for should not be granted, the court may accede to the prayer of the applicant to the prejudice of the respondent.

In Sanders v Nousek the application was made by notice of motion intituled in the original cause, for renewal of a judgment about to expire at the end of ten years. The judgment remained in part unpaid. Before the promulgation of Rule 331[2] it was necessary, in order to renew a judgment, to commence a completely new action by Statement

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(1) [1975] 3 W.W.R. 125

(2) 1962 Rules, 379; 1944 Rules 379.

of Claim. The renewed judgment by Notice constituted an innovation in our Rules derived from Saskatchewan Rule 356 and it appears for the first time in the 1944 consolidation. In the result we have a hybrid thing, partaking to some extent of the character of an interlocutory motion in that it is intituled in the original cause but partaking also of the character of an originating notice in that it must be served as a statement of claim is served and that there is not (nor could there reasonably be) any provision for service upon counsel. It is also specified that the saving Rule 548 shall not apply and therefore, if service is not accomplished upon the judgment debtor within the 10-year period, he is free and the judgment against him cannot be revived.

The Rules in essence prescribe a notice of motion which originates a proceeding -- an originating notice in all but name: but in the Sanders case it was held, firstly, that the document must comply with Rule 88 and in addition must call upon the respondent in very terms to 'show cause', as set out in the text of the Rule. If one examines the Saskatchewan Rule from which our Rule 331 was copied, it is abundantly clear that the committee simply duplicated the language of the Saskatchewan rule and there is no indication that the Rules committee did in fact address its collective mind to the consequences of the wording of the Rule, as the learned Master suggests: however, because in the Sanders case the Notice of Motion failed in terms to call upon the respondent to 'show cause', the application was denied.

It is therefore no longer true to say that the Rules provide for the commencement of proceedings by the three standard methods only, or even that the practice permits of these three standard vehicles plus the occasional aberration prescribed by statute, for Rule 331 provides for a special and different vehicle entirely. Sanders v Nousek gives us warning that if such reasoning in chambers is to be anticipated, we must consider as a distinct and separate group those instances in which the statute or a rule directs an applicant to call upon a respondent to 'show cause', either by notice or motion or in any other form, and the originating document should set out the warning

> and take notice that unless you appear at the time and place above noted and show cause why the applicant should not have the order for which he contends, the Court may grant ... etc.

Except for the forms peculiar to applications for orders in the nature of prerogative writs there is no provision in Alberta practice for a notice of motion to comply with Rule 89: but semble a notice analogous to that contained in Rule 89 should be endorsed upon any document whatever which purports to initiate proceedings in court or in chambers, lest an imaginative judge extend the requirement of the Rule beyond the bounds of Petition and Originating Notice to the cases in which a statute permits Mr Jones to come into chambers -- not through a door, but through the curtain of a simple motion. It is also devoutly to be hoped that the addition of such an endorsement may not be held to alter the prescribed character of the vehicle.

The show cause applications as this analysis will conceive of them, include the summons requiring the respondent to appear under the

Alimony Orders Enforcement Act to show cause why he should not be committed to gaol until he complies with the Order. This is included because it is in reality a civil matter, partaking of the nature of an appointment issued to a debtor to come and be examined upon oath in aid of Execution.

Other 'show cause' applications include the notice of motion under the Administration of Estates Act [3] calling upon a caveator to show cause why his caveat should not be discharged; a similar application under the Land Titles Act [4]; the appeal from a Guardianship Order [5] under the Dependent Adults' Act, which application is launched by originating notice.

One has no quarrel with the principle in the Sanders case, though it could perhaps be said to exhibit an excessive concern, but in the interests of uniformity there would appear to be no reason why this kind of notice might not simply be incorporated into the notice required by Rule 89.

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(3) R.S.A. 1970 c.1, s. 17; see Sched II p. 2

(4) R.S.A. 1970, c. 198, s. 146(1); see Sched II p. 98

(5) S.A. 1976, c.63, sec 67(1); Sched II p. 55

CHAPTER 8

V - APPLICATION FOR THE ADVICE AND DIRECTIONS OF THE COURT

These applications are brought in a variety of ways: by originating notice, notice of motion (e. g., under the Dower Act where the applicant prays for an Order designating a homestead or designating the personal property of a deceased which will be subject to dower)[1] or simply by application invoking Part 30 as in the Religious Societies Lands Act [2]. Such an application would appear to require a full and complete statement by the applicant of the state of affairs existing at the date of the application together with a summary of the relevant history of the background and then a request for the direction of the Court.

It has been held that the Court will not give directions in respect of routine matters which are the responsibility of the applicant and in Re George Estate [3] the Court pointed out, on an application for

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(1) The Dower Act, R.S.A. 1970, c. 114, s. 20(4) (Sched II, page 65) and s. 24(1) (Sched II page 66)

(2) R.S.A. 1970 c. 319, amended S.A. 1973 c. 13, s. 10(2) Section 27(4) of the Act, Sched II page 147.

(3) Re: George Estate: Public Trustee (George Estate) v Governors of the University of Alberta (1959-60) 30 W.W.R. 462

advice and directions under the Trustee Act, that the application

> should have been for advice and directions as to the inquiries which should have been made to ascertain the next-of-kin of the deceased or others who might in any way be interested in the distribution of the estate and effects of the deceased as was done in In re Barton Estate [1950] 1 W.W.R. 46; 4 Abr Con (2nd) 1205 (Sask) and Re Carvill (1913) 5 W.W.R. 189, 26 W.L.R. 189, 6 Sask L.R. 146, 19 Can Abr 943.

The burden of many of the judgments concerning applications for advice and directions is to the effect that the court will not assume the trustee's responsibility for routine decisions and that the trustee cannot by applying for advice, escape the burden of routine matters. A trustee however who has a genuine problem for which his solicitor is not able to provide the answer, can escape legal liability by consulting the court and this is the situation in which the application should properly be brought.

For such an application the procedure hereinafter contended for is admirably suited. The applicant's affidavit setting out the background and the facts as well as the questions upon which the applicant desires direction, initiates the proceedings. Under the Part 30 procedure, 'the affidavit may be sworn at any time'. [4]

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(4) The Rules of Court in respect to affidavits do not in terms set out the generally accepted rule that the affidavit in support of an application should be sworn after the commencement of the action. For authority for this proposition and for a discussion of its provenance, see McParland v Seymour [1925] 3 W.W.R. 666; per Chief Justice Harvey, Supreme Court of Alberta, Appellate Division and see also the 1979 case of Erwin W Block Professional Corp'n v Dickson (1979) 9 Alta L.R. (2d) 322 (S.C.). An affidavit in support of Garnishee summons sworn before the commencement of an action is grounds for setting aside the garnishment Order.

CHAPTER 9

NON - CONTENTIOUS APPLICATIONS

VI - APPLICATION FOR REVIEW AND APPROVAL

This is similar to the application for Advice and Directions but it differs in emphasis: the applicant, essentially, is appearing before the Court with his decision made. His accounts are prepared. He asks the Court to review them and to approve them. The Co-Operative Associations Act [1] and the Credit Union Act [2] provide for such an application by the liquidator. The Cemeteries Act [3] calls for a passing of accounts at least every 5 years. Also in this section has been placed the application to a judge for an Order confirming a settlement as being in the best interests of an infant, although it could probably be successfully argued that this application belongs more properly in Division VII(7).

The classic case of a passing of accounts is, of course, that provided for by the Rules of the Surrogate Court in which an executor or administrator places before the court a detailed report of his dealing with the estate assets and his settling of proper obligations, and his

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(1) R.S.A. 1970, c. 67, s. 49; Sched II page 51

(2) R.S.A. 1970, c. 74, s. 75(12); Sched II page 51

(3) R.S.A. 1970, c. 39, ss. 43; 59(1); Sched II page 23

distribution in accordance with the Will or the intestacy of the residue according to law. Inevitably the Court will be assisted by some official who is qualified to check the figures in the accounts and in most cases it is possible that the application will resolve itself into a formal exercise. Part 30 is presently the prevalent vehicle and it is submitted that this is emphatically as it should be.

The principal question is one of notice. The court, in considering the matter of an executor's administration of an estate, will probably be concerned mainly with ensuring that all persons who have an interest in the fund in question should have an opportunity to be represented in person or by counsel in order that they may raise any questions that seem appropriate regarding either the administration of the estate or the emolument of the executor or liquidator; for the latter question is normally dealt with upon the same occasion. The preliminary application is therefore highly to be desired. At the preliminary ex parte appearance of the administrator the judge has an opportunity of scanning the supporting material and it may please His Lordship then to comment upon its sufficiency: then, having regard to the distances involved, the state of health of the beneficiaries and other incidental questions, the length of notice to be given for the final passing can be determined: an originating notice can then be taken out and service made of the supporting material including any additional material which the judge may have thought it appropriate to require the administrator to serve.

VII - APPLICATION FOR ADMINISTRATIVE SANCTION

This application bears a certain relation to the application for review and approval: it differs, also, however, in that it involves a higher degree of attention from the Bench and rather more of a judicial exercise. Such an application involves the applicant approaching the Court with a firm proposal for action and requesting approval of the proposed procedure upon such terms as the Court may see fit to direct. These applications include, for example, an application for a change in bond after issue of a grant [1]. Presumably the executor or administrator, having dealt with most of or all of the debts and being obliged for some reason to keep his file open, might approach the bench pointing out that the situation has now materially altered since the date of the grant and urging that there is no occasion now for a bond in the higher amount. He might suggest a suitable figure and ask for an Order reducing the security.

This category has also been made to include applications for orders, the right, absolute or conditional, to which is granted by legislation and therefore the applicant need only appear before the court and show that he has fulfilled the conditions. He should then be given the relief set out in the applicable legislation. An example of such an application is the Order under the Builders' Lien Act discharging all liens where no trial of a Lien action has been held within two years of

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(1) Administration of Estates Act, R.S.A. 1970, c. 1, Section 34; Sched II page 4

the registration of the certificate of Lis Pendens.[2] Semble, there is an absolute right to the order but the action does not come automatically to an end: the order must be sought. In point of fact it could perhaps be said that this latter application should fall within the purview of interlocutory matters and thus outside the scope of this work, except for the fact that 'any interested party' may apply and this opens the door to persons other than the litigants: to a prospective purchaser, for example.

In this category has been included a petition for the adoption of a child by reason of the fact that the application, normally unopposed, consists of laying before the court evidence of the compliance of the applicant with all the prerequisite conditions for the desired order and presenting the order for signature.[3] There is normally no adjudication between contending parties: simply a prayer for the court's endorsement of a proposed course of action. In this category also are applications for appointment of auditors as under the Companies Act[4] or a petition for winding up a company[5] or the many applications for the approval of the court of predetermined procedures by owners of condominium property.[6]

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(2) The Builders' Lien Act, R.S.A. 1970, c. 35, section 33(2); See infra, page

(3) The Child Welfare Act, R.S.A. 1970, c. 45; section 50; Sched II page 26

(4) The Companies Act, R.S.A. 1970, c. 60, section 116(6); Sched II, page 38;

(5) Ibid., Sections 197 to 199; Sched II page 43.

(6) The Condominium Property Act, R.S.A. 1970 c. 62; Sched II, pages 48 and 49.

If any type of application is controversial as to its inclusion or exclusion of exemplars, this one may be said to be so. The legislation provides that many of these applications shall be brought by Petition (as for example the several applications provided for under the Condominium Property Act[7]) and the remainder would seem invariably to invoke Part 30 or to provide specifically for an ex parte application which, of course, resolves itself into the same thing.

The arguments urged supra in respect of the 6th category[8] would appear to obtain as well in respect of the 7th and unless there is some virtue in the petition which the writer has failed to grasp, it is submitted that in the interests of uniformity and efficiency, the modified Part 30 would provide a suitable vehicle for applications for administrative sanction by the court.

VIII - APPLICATIONS FOR FIATS OR CERTIFICATES

Closely allied to the applications for Administrative Sanction are the applications for fiats or certificates. Notwithstanding the Rules there is generally believed to be an inherent jurisdiction contained in the Judicature Act[9] which admits of a solicitor approaching a judge in court, in chambers, in his office or on the golf course, for that matter,

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(7) Supra, see note (6) at page 96

(8) Supra, at page 94, paragraphs 2 and 3

(9) R.S.A. 1970 c. 192, s. 15(2)

to request a fiat under a statute and authorizing registration, for instance, of an instrument notwithstanding a defect in the execution of that instrument.[10] This category also includes applications to a judge for a certificate to the effect that the judge is 'satisfied' of the payment of all moneys due under a mortgage[11].

Included in this class of application are certificates, the application for which is somewhat more formal, but they all involve the same essentials: counsel, by whatever means, lays before the court the facts and prays for an order declaring that the court is satisfied of a fact upon the basis of the evidence presented. Included in this category are applications to the Court under the Insurance Act[12] for a declaration

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(10) A fiat is normally endorsed upon the document in question and might read as follows: (the following text was dictated to the writer by a judge)

> Upon examination of the within instrument by myself _______ _______ a justice of the Court of Queen's Bench of the Province of Alberta; UPON my being satisfied of its due execution by _________________, authorization is hereby given, pursuant to the provisions of Section 159(2) of the Land Titles Act [or as the case may be] for the registration of the within instrument in the office of the Registrar of Land Titles for this North Alberta Land Registration District [or as the case may be] to prove the facts therein set out: notwithstanding the proof of the execution of the said instrument by the said _________________ is defective under the provisions of the said Act.
>
> Given at Grande Prairie, Alberta [or, as the case may be], this (date)
>
> ______________________ Justice of the Court of Queen's Bench

(11) As to this see infra page and refer Moreau v Baker and Moret [1947] 1 W.W.R. 1098 (Alberta Supreme Court, Appellate Division,) the judgment of Justice Ford, J.A.

(12) R.S.A. 1970 c. 187, Part 6, LIFE, Sections 266 and 267, Sched II, page 87

as to the sufficiency of evidence furnished in respect of a proof of claim under a Life contract: also an application for a declaration of presumption of death under the Insurance Act,[13] or under the Marriage Act [14]; or, under the Trustee Act [15], for an Order declaring someone to be a 'missing person'.

The applications for orders presuming death under the Marriage Act are brought by petition; a similar declaration of death under the Insurance Act is applied for on 30 days' notice, but the originating document is not prescribed [16]. No form is prescribed, either, for the application under the Intestate Succession Act by a child or a personal representative for an order confirming the right of an illegitimate child to inherit from his father [17].

The comments of Justice Ford above referred to[18] deserve to be included in this study, in full: they were elicited at the specific request of Mr. Morrow (as he then was) who appeared in the matter for the appellant and requested

> that some assistance should be given to the profession with respect to the procedure to be followed to obtain a certificate under clause (b) of sec. 107(1) [of the Land Titles Act] above quoted, and under

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(13) Insurance Act, R.S.A. 1970 c. 187, s. 267 Sched II, page 87

(14) Marriage Act, R.S.A. 1970 c. 226, s. 20(1) Sched II page 111

(15) The Trustee Act, R.S.A. 1970, c. 373[amended 1973 c. 13 s 12(2) 1974, c. 14, s. 7(3)] - Section 10

(16) Insurance Act, R.S.A. 1970 c. 187 s. 267, Sched II page 87

(17) The Intestate Succession Act, R S.A. 1970, c. 190, s. 16(1) Sched II, page 89

(18) Note (11) supra

clause (c) of the same subsection which is as follows:

> "(c) upon the production of a certificate signed by a judge certifying that the right of any person to recover any money secured by the mortgage or incumbrance has been extinguished by reason of the operation of the provisions of the Limitation of Actions Act"

To which the Court replied

> "While ordinarily the court would refuse such a request, I think, in view of the way the matter was put to us, it may be wise to accede to it.
>
> "In my opinion, it is not necessary to proceed by way of petition, statement of claim or originating notice as in the Saskatchewan case referred to, nor even by way of notice of motion as has been adopted in the application before Shepherd, J. The section contemplates an informal ex parte application to be made in the first instance; whereupon the judge applied to may give directions as to the procedure to be followed to 'satisfy' him of the payment alleged. No certificate should, however, be granted without notice being given to all parties interested in maintaining the mortgage as a charge on the land. This notice may be given in such manner as the judge applied to may direct and on its return it should be dealt with in a summary manner unless it appears that a triable issue is involved, when directions should be given for the trial thereof. The proceedings need not be styled in or issued out of the court, but as, in my opinion, the certificate is an order or decision within the meaning of the Extra-curial Orders Act, it may be filed in court as provided by sec. 3 thereof."

This judgment would lead us to believe that in the matter of issuing a 'certificate' the judge is acting as a persona designata and not as a judge of the court.

Surely the spirit of Justice Ford's comments would be carried into effect by the use, in the 'certificate' and 'fiat' applications, of the procedure contended for infra: that is, of the modified Part 30. Indeed, Justice Ford describes this procedure in detail in his comments. Indeed, applications provided for in more recent statutes tend to be left to the procedure prescribed in Part 30.

IX - APPLICATION FOR MITIGATION OF A RULE

These applications pray for mitigation of the rigours of a rule or of a statute and include all of the time-enlarging applications as well as applications for orders permitting rectification of omissions or misstatements under the Bills of Sale Act, the Conditional Sale Act and so on. It is clear that notice must be given to persons whose rights are affected by the correction, rectification or extension. Except for the Application under the Land Titles Act for an Order extending the time for proceeding on a Caveat, none of the 'mitigation' applications prescribes a form. The principles applicable to these applications are probably set out in the cases collected under Rule 548. First of all, it is axiomatic that where a statute and a rule conflict, the statute (in Alberta) is paramount [19] and, even if the rules had statutory effect the particular must prevail over the general [20]. Having mentioned these two first principles, we may seek in Royal Bank v Morin [21] and in Burkinshaw v Bodruk [22] the view of the Alberta Court of Appeal with respect to mitigation of the rigours of a rule. The principles are set out in the judgment of Bessemer, Master in Supreme Court Chambers, in his remarks in Newman v Dawson [23] in which he adverts to his own judgment in Miasek v Buchholz [24] in which he reviews the authorities.

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(19) Cdn Pittsburgh Industries v Bd of Industrial Relations (1977) 3 Alta L.R. (2d) 162; 77 D.L.R. (3d) 581; D.C. McDonald, J. Alta S.C.
(20) Ibid.
(21) (1977) 6 A.R. 341
(22) 9 Alta L.R. (2d) 30
(23) (1977) 4 A.R. 303
(24) 30 September, 1976 (not reported); S.C. #113272; Bessemer, Master

It goes without saying that the Part 30 procedure is admirably suited to an application for mitigation in cases other than those in which the application constitutes an interlocutory motion.

X - APPLICATION FOR DISTRIBUTION OF FUNDS

This type of application occurs but seldom. It has been placed in a separate category by reason of the fact that it has some peculiar characteristics. Although there may be no contending party, the applicant must come prepared to defend in advance against possible adverse claims while proving to the satisfaction of the court his own entitlement. The Tax Recovery Act authorizes an application [25] by a person having a claim upon the proceeds of a tax sale, after all of the taxing authority's proper charges have been satisfied. The Dower Act [26] provides for an application for payment out of the provincial Assurance Fund of a judgment for damages recovered against a spouse pursuant to the provisions of Section 12. The Administration of Estates Act provides for an application in small estates by a person who claims to be entitled, where the proceeds of the estate had, pursuant to the provisions of the Statute, been paid out to the Provincial Treasurer for want of an heir [27]. The Dower Act prescribes an Originating notice in applications under section 14(1); the Tax Recovery Act is silent and

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(25) R.S.A. 1970, c. 360, s. 28(1); Sched II page 163

(26) R.S.A. 1970, c. 114, Sections 14 and 15; Sched II, page 66

(27) R.S.A. 1970, c. 1, Section 21(1), Schedule II, page 3

although in the past many of such applications have been brought by originating notice, the much preferable vehicle of special application is available and, indeed, it is now de rigeur in view of the wording of Part 30 (Rule 395(1)) which, unlike Rule 410, is not permissive in terms but rather, mandatory. Properly speaking, any application brought by originating notice under the Tax Recovery Act should, then, be dismissed upon the basis that it does not come within Rule 410 and does, specifically, come within the mandatory provisions of Rule 395(1).

An interesting application is included in this category: that provided for under Section 8(3) of the Warehouseman's Lien Act[28]. The section provides for an application to direct a Warehouseman to pay the surplus proceeds of a sale (after satisfaction of his lien), into court. The initial order may be made ex parte, but the statute implies that the court may adjudicate between conflicting claims. The statute, however, does not say this and the whole procedure provided for in the Lien statutes requires, it is submitted, considerable clarification.

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(28) R.S.A. 1970, c. 386, s. 8(3); Sched II, page 175

CHAPTER 10

CONCLUSION

The types of application herein listed are, of course, arbitrary and the writer advances them with trepidation. However because of the plethora of authorized applications to be brought in a summary way and because of the variety of procedures currently being followed, some within the aegis of the Rules and the Statutes and some without any such sanction, the task of analyzing the summary procedure would be impossible unless an attempt, however clumsy, were made to classify.

By allocating each application to a category as has been done, we conclude that there is no consistency among various proceedings of any one type, either as to the forum prescribed, as to the document which originates the proceeding, nor as to the time for service, the mode of service or, indeed, at all. More important, principles enunciated from time to time by members of the judiciary are confined, by our 'filing system', to one particular type of order when it may well be that these principles are in fact of much wider significance and may with profit be taken to obtain in general to the group.

Noting with interest the reasoning in Sanders v Nousek[1]

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(1) [1975] 3 W.W.R. 125; and see supra at page 87

which essentially ascribes to the rules committee an improbable degree of circumspection, one may be impressed with the necessity of laying down, once and for all, a set of clear, unambiguous rules for the practitioner which will enable him to avoid the procedural pitfalls which now bedevil him. Semble, it should suffice for him to address himself to the substantive law and the merits of his case without spending inordinate amounts of time upon the mechanics of his application.

Schedule I of this work to this end lists the applications authorized to be brought under the Statutes and Rules up to and including amendments to 1978. No attempt has been made to reach beyond this point lest the exercise prove endless. Schedule I also attempts an overview of the salient features of each application, listing for each one its type, its originating document, the forum having jurisdiction over it and, lastly, a reference to a page in Schedule II upon which the application is dealt with in rather more detail. Schedule II attempts to present the available material in respect of each application: the cases in which the matter has been considered and any other statutory references and rules which bear upon it.

This work constitutes only the beginning of the task, for clearly there ought to be available to the profession in Alberta a reference volume or volumes which would enable the practitioner to proceed unerringly to prepare any application authorized by the statutes or the rules, secure in the knowledge that he has at his fingertips all of the statutory authority and all of the judicial pronouncements which bear upon his case.

Having unblushingly taken the unpopular position that our revered adversary system may not, necessarily, embody the summum bonum of judicial wisdom, the writer will now go further along the primrose path to suggest that, perhaps, some of our difficulties stem from the fact that our system of court reporting is controlled by that sacred institution, free enterprise. An Alberta decision at any level -- even at the level of the Court of Appeal, may be reported in any of the following sets of Reports: the D.L.R's, the W.W.R's, the A.L.R's (2d), the A.R's, the Alberta Unreported Decisions -- not to mention the many specialized Report Services which deal with limited areas of the practice and which, of course, are of enormous value. A caveat may be placed upon that last, however, in that in Carswell's Practice Cases we are confronted with the totality of Canadian Practice decisions and we do not have segregated our own peculiar rules, and this, it is submitted, to the prejudice of clarity and certainty. Alberta practice does not by any means always follow the rules set out in other common law jurisdictions and it is strongly urged that a practice manual dedicated exclusively to the Province of Alberta would be of enormous value to the Profession. It is obvious, also, that such a manual would be of limited interest to a publisher, because of the limited circulation it would have.

Notwithstanding this last-mentioned circumstance which is of commercial relevance only, it is submitted that the first thing that is required is a universally accepted number system for the classification of material: a system akin to the Dewey Decimal which has found adherents in most of the district public libraries in Canada and the United States. The Dewey System, simple and widely accepted, enables a researcher to find material quickly and easily. It matters not what system is adopted: what matters is that it should be agreed upon by all of the collators of material.

A practice manual should enable a practitioner to file away in such manner that he may retain instant access to it, any and all material which he considers worthy of being retained for reference. The basic practice manual which the writer envisions would consist of

(1) a course for 'para-legal' personnel, accepted province-wide and providing a hand-book for persons employed in legal offices;

(2) a larger, more complete manual, with provision for the dissemination of materials prepared and circulated by legal education groups: each page of which ought to be dated when revised;

(3) an index covering all of the published literature: that is to say,

  (i) all cases reported from Alberta Courts, in any law report;

  (ii) a subject index with cross-reference covering the above and

  (iii) a reference to all of our statutes and rules together with concordance tables and lists of relevant material from the literature of other common-law jurisdictions.

The manual referred to in (2) ought to contain check lists, duly brought up to date, for each and every common procedure. One need only reflect for a moment upon some of the more usual and common processes to realize how impossible it is to commit to memory the necessary steps in any file, no matter how simple. The writer has, in her Check List for Foreclosure, for example, a list of 33 items, many of which in turn contain long lists of requirements. The necessity of keeping available such check lists is pointed up by the judgment in Schloss v Koehler [1A] in which the court defined the acceptable standard of performance required by a practitioner in Alberta, anything less constituting negligence. One cannot quarrel with Their Lordships' view, for anything less would erode public confidence in the profession. It is, however, a matter for conjecture how many offices in this province or any other contain properly organized check lists or sheets of instructions adequate for each task undertaken by members of the firm.

Apart from the need for an Alberta manual for the practitioner, two problems, it is submitted, have been isolated by the foregoing study. First, we have seen that the mantle of jurisdiction of the courts in England has fallen in its entirety upon the shoulders of our judges. We have noted, however, that this mantle may well contain a rent or two. It may be that these lacunae or limitations in judicial power have their origin in the plurality of jurisdictions that existed before the Judicature Acts. It may be, also, that these limitations have been adopted by us, along with the promulgation of our own Judicature Act and it may also be that these limitations are to be regretted, particularly if they do

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(1A) (1978) 8 A.R. 559

result, in foreseeable circumstances, in a failure of jurisdiction, the reason for which has now long ceased to be.

The Judicature Act defines the jurisdiction of the courts in the Province additional to that which they derived from the Supreme Court of the North West Territories [2]. We must take it, then, that such

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[2] Additional powers, etc. of Court

15. (1) For the administration of the laws for the time being in force within the Province, the Court possesses within the Province, in addition to any other jurisdiction, rights, powers, incidents, privileges and authorities that immediately before its organization were vested in or capable of being exercised within the Province by the Supreme Court of the North-West Territories, the jurisdiction that on the 15th day of July, 1870, was in England vested in

(*a*) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court,
(*b*) the Court of Queen's Bench,
(*c*) the Court of Common Pleas at Westminster,
(*d*) the Court of Exchequer as a Court of Revenue, as well as a Common Law Court,
(*e*) the Court of Probate,
(*f*) the courts created by Commission of Assize, of Oyer and Terminer and of Gaol Delivery, or any of such commissions, and
(*g*) any other Superior Court or Court of Record.

(2) The jurisdiction mentioned in subsection (1) includes

(*a*) the jurisdiction that at any time before the organization of the Court was vested in or capable of being exercised by all or any one or more of the judges of the said courts, sitting in Court or chambers or elsewhere, when acting as judges or a judge pursuant to a statute, law or custom,
(*b*) all the powers given to any such Court or to any judges or judge by a statute, and
(*c*) all ministerial powers, duties and authorities incident to any and every part of the jurisdiction so conferred. [R.S.A. 1955, c. 164, s. 15]

Jurisdiction in specified cases

16. For the purpose of removing any doubt, but not so as to restrict the generality of section 15, it is declared that the Court has the like jurisdiction and powers that by the laws of England were, on the 15th day of July in the year 1870, possessed and exercised by the Court of Chancery in England in respect of

CONTINUED overleaf

limitations of jurisdiction as existed in Chambers in England exist in Alberta today.

Nor does the Interpretation Act assist us: section 5 skirts the subject but fails to prescribe the forum in which the jurisdiction may be exercised. It may be that this omission simply indicates that the point raised is devoid of substance, although to say so would be to flout the Ontario Court of Appeal. The section reads

> 5. (1) Whenever by an enactment judicial or quasi-judicial powers are given to a judge or officer of a court, the judge or officer shall be deemed to exercise such power in his official capacity and as representing the court to which he is attached, and he may for the purpose of performing the duties imposed upon him by the enactment, subject to the provisions thereof, exercise the powers he possesses as a judge or officer of the court.

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(2) (from previous page)
CONTINUED

- (*a*) fraud, mistake and accident,
- (*b*) all matters relating to trusts, executors and administrators, partnerships and accounts, mortgages and awards, or to infants, idiots or lunatics and to the estate of infants, idiots or lunatics,
- (*c*) the staying of waste,
- (*d*) compelling specific performance of agreements and contracts,
- (*e*) compelling discovery of concealed papers or evidence, or such as might be wrongfully withheld from the party claiming the benefit of the same,
- (*f*) preventing the multiplicity of actions,
- (*g*) decreeing the issue of letters patent from the Crown to rightful claimants,
- (*h*) decreeing the repeal of and making void letters patent issued by mistake or improvidently or through fraud,
- (*i*) the administration of justice where there exists no adequate remedy at law, and
- (*j*) a grant of injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title.

[R.S.A. 1955, c. 164, s. 16]

Rules of decision

17. The rules of decision in matters mentioned in section 16, except where otherwise provided, shall be the same as governed the Court of Chancery in England in like cases on the 15th day of July, 1870.

[R.S.A. 1955, c. 164, s. 17]

> (3) Where any enactment of Alberta or any law in force in Alberta provides that any proceeding, matter or thing shall be done by or before a judge, the term "judge" in all such cases means a judge of the court mentioned or referred to in the enactment: and any proceeding, matter or thing, when properly commenced before a judge, may be continued or completed before any other judge of the same court.

It may be that the distinction between 'court' and 'chambers' is, in Alberta, spurious. It may, and probably does, derive from a term which had its origin in the Chancery practice. The fact remains that the distinction is retained in many instances in the Alberta statutes and in order to lay to rest any confusion that may exist, a minor amendment to the Interpretation Act might be salutary. If, in Section 5(1) of the Interpretation Act, the words "subject to the provisions thereof" were to be expunged and, after the word "exercise" there were added the words "in court or chambers or elsewhere", the result would be to do away with the problem. The section would then read

> "Whenever by an enactment judicial or quasi-judicial powers are given to a judge or officer of a court, the judge or officer shall be deemed to exercise such power in his official capacity and as representing the court to which he is attached and he may for the purpose of performing the duties imposed upon him by the enactment, exercise in court or in chambers or elsewhere the powers he possesses as a judge or officer of the court.

Obviously he must exercise only the powers granted to him by the enactment and it is submitted that the words 'subject to the provisions thereof' lead us back into the identical trap from which we are endeavouring to escape. Some such legislative provision could forever lay to rest the lurking chimaera of defective jurisdiction and do away with the kind of reasoning that prevailed in the Sovereign Securities case[3].

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(3) [1964] 1 O.R. 7, and see page 13, line 26 & ff.

When may the summary procedure be used? There must be specific authority for it either by statute or in the Rules [4]. It is therefore submitted that a SUMMARY PROCEDURE ACT might incorporate the provisions of Part 30, but provide a procedure slightly more elastic. Part 30 is now ousted where a Rule or a Statute dictates a procedure. However, in many instances in which a procedural vehicle is prescribed there is also a provision that the judge may direct service upon 'such persons as he shall see fit'. There will be no opportunity for such direction if the returnable date is fixed at the time of the issue of process. The initial application for directions as to service ought to be based upon the applicant's affidavit as to the facts and circumstances together with a statement of the identity of all persons who may have an interest in the matter.

The procedure ought also to allow for a swift solution to summary matters and it will be noted that counsel is, in the following suggested procedure, given a choice whereby he may accomplish service upon his own initiative upon such persons as he may consider necessary, in which case it will always be open to the presiding judge to direct an adjournment for the giving of notice to other persons. However, if counsel has chosen wisely, he may accomplish his purpose in one single appearance.

The following is the suggested text of a SUMMARY PROCEDURE ACT:

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(4) Brown v United British Insurance Company Ltd (1951) 1 WWR (NS) 767

1. Notwithstanding anything contained in any Statute of Alberta, where under a Statute or under a regulation or under the Rules of Court the court or a judge is designated as having authority to issue any certificate or make any direction or order, otherwise than in an action commenced by statement of claim, and

(a) no procedure for an application to the court or to a judge is provided

or

(b) it is provided in the statute, regulation or under a rule that an application be brought by petition, by originating notice of motion, originating notice, originating summons, notice of motion, summary application, motion or application

the applicant may elect to proceed as hereinafter set out.

2. The applicant may either

(a) elect to proceed upon notice, without the directions of a judge first applied for and obtained, as provided for in section 4 hereunder,

or

(b) elect to proceed by special application as provided for in section 3 hereunder.

3. If the applicant elects to proceed upon special application the following shall apply:

(a) It shall not be necessary to file any document commencing proceedings, but the applicant shall, on an affidavit of the facts, apply ex parte to a judge who may

(i) proceed to determine the matter ex parte or

(ii) direct that the matter be set over for hearing on notice, in which case the judge shall designate what persons are to be served with notice, whether or not such persons are parties to the proceedings, and the judge may prescribe the nature of such notice and the time for and the mode of service.

(b) the directions given shall either be endorsed upon the affidavit of facts or shall be set forth in an order.

(c) Subject to any such directions the form and content of the notice and the procedure applicable shall be as follows:

(i) an originating notice in Form A or to the like effect shall initiate the proceedings, modified in such manner as may be necessary, having regard to the nature of the application·

(ii) every originating notice shall include a statement of the questions on which the applicant seeks the determination or direction of the court, a concise statement of the nature of the claim made and of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause of action for which the applicant claims the relief or remedy and a reference to the evidence to be adduced in support of the application.

(iii) a copy of the originating notice and a copy of each affidavit to be used in support of the application shall be served 10 days before the day named in the notice for the hearing of the application.

(d) Upon the return of the motion the judge may permit evidence to be given orally.

(e) The judge may summarily dispose of the questions arising on the application and make such order as the nature of the case requires or may give such directions as may be proper for the trial of any questions arising upon the application.

4. If the applicant elects to proceed upon notice, the following shall apply:

(a) the applicant shall serve personally or by double-registered mail upon such respondent or respondents as he thinks necessary or appropriate, an Originating Notice (Form A) calling upon the respondent or respondents to appear in chambers upon a date set out in the originating notice, to show cause why the order prayed for should not go;

(b) the originating notice shall be in accordance with the provisions of Section 3(ii) hereof;

(c) concurrently with the originating notice the applicant shall serve upon all respondents an affidavit deposing as to the facts upon which the application is based.

(d) The returnable date of the application shall (unless a judge on ex parte application otherwise orders) be not less than 10 days after the date of the service of the originating notice and affidavit.

(e) Upon the return of the motion the judge may permit evidence to be given orally.

(f) The judge may summarily dispose of the questions arising on the application and may give such order as the nature of the case requires or may give such directions as may be proper for adjournment and service of other persons who should properly be served with notice of the application, whether parties to the proceedings or not, or may give such directions as may be proper for the trial of any question or questions arising upon the application.

5. In any application under this procedure,

(a) All original affidavits, orders or directions and copies of notices, shall be filed in the office of the clerk of the judicial district in which the application is made;

(b) Affidavits for use in the proceedings under this procedure may be sworn at any time.

(c) Costs of and incidental to any application under this procedure are in the discretion of the judge hearing the application and subject thereto, Part 47 of the Rules of Court shall apply.

It is difficult to draw to a close a screed which constitutes, really, only 'the end of the beginning'. It is cwrtainly not intended to make invidious suggestions regarding the level of services presently provided by the profession but for the sake of the discussion, it is necessary that we take for granted (and for this the apologies of the writer are extended), that the practitioner is not, at the time of writing, always sublimely au dessus de son affaire: that he would contemplate with approval a tool or tools which enabled him to save his energy and his time.

Someone once inquired of Frank B. Gilbreth, the Motion Study engineer:

-- "But what do you want to save time for?"

-- "For work, if you love that best", said Mr. Gilbreth; "For education, for beauty, for art, for pleasure .. for mumblety-peg, if that's where your heart lies!" [5]

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(5) Cheaper by the Dozen, Gilbreth, Frank B., Jr. and Carey, Ernestine Gilbreth, New York 1948

The foremost authority on Builders' Liens, both as to the applicable law and as to procedure, is the comprehensive work of Macklem and Bristow, the current edition of which dates from 1978. (*) Because of its general application to the law of Mechanics' Liens across the country and its reference to any and all jurisdictions indescriminately, it must be read always in the light of our own Act and having regard to the binding decisions of our own Court of Appeal. The practical value of a text of general application is qualified because, for example, of the divergent decisions by the Ontario courts and those of Alberta even in respect of the construction of statutes of identical wording. An instance of this divergence which comes immediately to mind is to be found in Northlands Grading Co. [1960] O.R. 455 and Western Caissons (Alberta) Ltd v Bower et al and Amfab Products Ltd (1970) 71 W.W.R. 604, following John Wood Co. v Canadian Credit Men's Trust Association (Trustee in Bankruptcy of Brown-Plotke Eng. and Const. Ltd. (1962) 39 W.W.R. 593, 4 C.B.R. (NS) 149, reversing (1962) 38 W.W.R. 34, 3 C.B.R. (NS) 303, discussed infra at page on the question of whether or not a lien attaches in favour of a materialman in respect of materials not incorporated into the structure.

The learned authors point out that the protection of a lien in favour

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(*) Mechanics' Liens in Canada, 4th Ed., by D.N. Macklem and D. I. Bristow, 1978, The Carswell Company Limited, Toronto. The text includes a table of concordance with is of assistance in relating the work to the Alberta statute.

of a worker or materialman does not originate in the common law, but rather in the Roman law and the concept comes to us by way of a procedure which was first adopted in the United States. It is, of course, a right which arises quite independently of any privity of contract and it is therefore not surprising that the Act should prescribe for the enforcement of this statutory right a procedure which varies significantly from the usual course of litigation.

Although the Builders' Lien action is brought by Statement of Claim of the lien claimant and would therefore seem, by the rules which the writer has set herself, to fall outside of the purview of this work, the summary nature of the proceeding and the many provisions of the Act providing for applications to the Court would logically permit of the inclusion of the Builders' Lien procedure in a discussion of the summary procedure in Alberta. This is particularly true in view of the conclusion that will be reached: that is, that the summary procedure prescribed by the statute ostensibly to advance the course of justice in Lien actions has, in fact, achieved the opposite effect. This paper will contend that the said procedure, while unquestionably well-intentioned, is cumbersome, difficult and fraught with deep and dangerous pitfalls.

Over and above the rules which govern actions generally, the parties to a Builders' Lien action must take note of the additional procedural provisions of the Act. The lienholder

(a) must file his lien within 35 days (section 30);

(b) his lien falls within 180 days after filing unless, meanwhile, his action has been commenced and his *lis pendens* filed at the Land Titles Office (section 32(1)).

(c) The action must be brought in accordance with the specific provisions set out in Section 36.

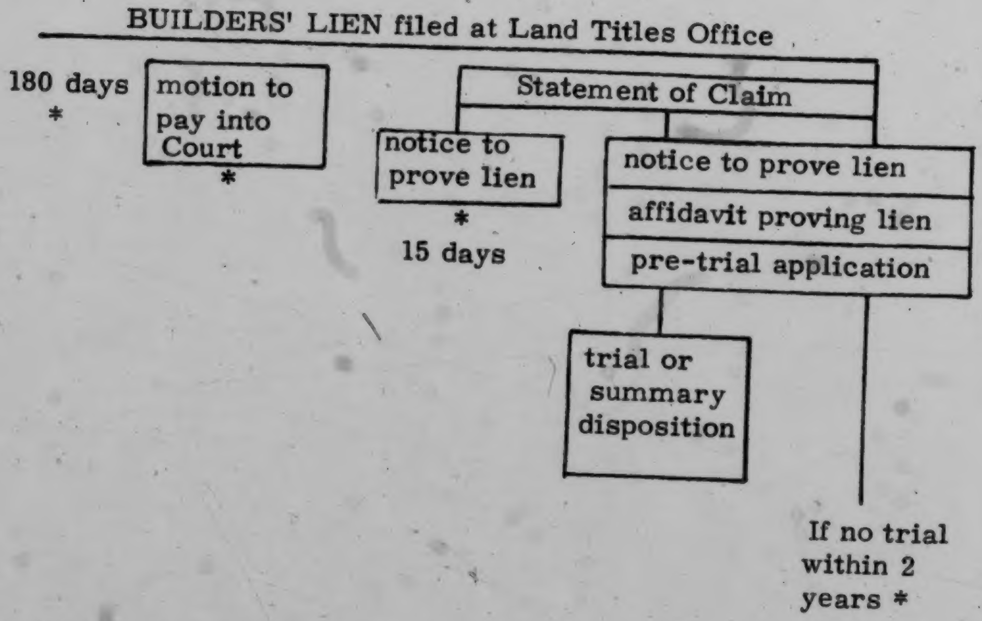
(d) The owner or a person opposite in interest from the lienor may make an application to the Court under sections 34(3) and 35(1) or, alternatively, under section 18, for permission to pay into court moneys which now take the place of the land as security. At this point the lien is expunged from the title and the lien-holder is left to prosecute his action with the moneys in court serving as security in place of the land. The lien fund, of course, is available to benefit other lienholders as well.

(e) The lien falls even after action brought if a Notice to Prove Lien having been served upon the lienholder under Section 38(5), he fails to file an Affidavit Proving Lien within 15 days thereafter.

(f) The lienholder is also obliged by the provisions of section 39 of the Act, before setting his action down for trial, to cause to be made a 'pre-trial application' upon 10 days' notice to all parties concerned.

(g) If the action has not been tried within 2 years from the date of registration of the *lis pendens*, the lien may be cancelled and the lis vacated upon application by notice of motion by any interested party; (section 33(2)).

The following chart serves to illustrate the precarious existence of a Builders' Lien:


BUILDERS' LIEN filed at Land Titles Office
180 days
*
motion to pay into Court
*
Statement of Claim
notice to prove lien
*
15 days
notice to prove lien
affidavit proving lien
pre-trial application
trial or summary disposition
If no trial within 2 years *

(*) indicates that the lien falls.

From the point of view of the adversary, the owner or any person who desires to have a lien cancelled

(a) may apply under section 18(2)(b) or section 35(1) to pay into Court or give security and have the lien cancelled and have the lis pendens removed from the title upon Certificate of Payment In by the Clerk of the Court (section 34(3)(b)).

(b) After service upon him of a Statement of Claim by the Lienholder, he may serve the Lienholder with a Notice to Prove Lien and after 15 days if no Affidavit Proving Lien has been filed, the lien falls. (Section 38(5)).

(c) After two years from the filing of the lis pendens, if the action has not been tried, application may be made by Notice of Motion in the action for an Order directing the removal of all liens and for the cancellation of the lis pendens. (Section 33(2)).

It is interesting to note that Section 33(2) does not provide for a lengthening of the time by Order of the court. Presumably one could apply by virtue of Rule 548(1) for an Order extending the time for trial, but it is arguable that it was the intention of the Legislature that dilatory prosecution of his claim should result in a lienholder's losing his right and that the section was designed to prevent delay. I am not aware of any case on the subject.

Following the carefully reasoned judgment of the Alberta Court of Appeal in Driden Industries Ltd v Sieber and Willemcen [1974] 3 W.W.R. 368, it is possible to assess the procedures provided in the Act and to consider the rather important lacuna which, in the view of McDermid J.A., exists in the procedure as presently constituted. In Driden Industries a lien was filed by two sub-contractors of Driden, itself a sub-contractor. Driden paid the amount of the lien into court and, pursuant to the provisions of Section 34(3) the lien was cancelled. No action having been commenced by a date 180 days after payment in, Driden applied to have the moneys in court paid out to itself. The application in the first instance was successful. Upon appeal, however, Justice McDermid reversed the decision of the Chambers Judge and discussed the procedure. His Lordship concluded that the applicant, at the time of payment in, should properly apply also for directions to settle the issue. His Lordship concedes that nothing in the Statute lays upon the applicant any such obligation. His Lordship held, in effect, that the statute is lacking in that it does not specifically provide that when applying to pay into court a sum for security such that the lien may be expunged from the title, the applicant should seek the direction of the Court as to the resolution of the dispute. With the greatest respect to His Lordship's view, surely it is up to the lienholder to prosecute his lien and surely it is unrealistic to place upon a defendant the duty to be diligent in the controversy. In the alternative, perhaps the Act might make it an essential feature of the application for payment into court of the lien fund or security that at the same time the applicant do serve upon the Lienholder the statutory Notice to Prove his Lien by Affidavit along with Notice of an Application for Payment In. Indeed, if the action has been commenced, that would be cautious practice in any event.

In the alternative -- and this is the result for which this paper would contend -- perhaps the whole summary procedure should be reviewed with an eye to simplifying it: for at present the summary procedure, for example, provided by the Builders' Lien Act, while perhaps less time-consuming than a full-scale trial might be, contains complexities which may operate to the prejudice of all of the parties involved. It constitutes a distinct and individual type of action with a procedure all its own: a procedure, moreover, with which no-one in the profession seems to be completely at home.

In the 1960 Act there appeared a section, quietly left out of the

1970 consolidation, which read as follows:

> 44. Except as provided in this Act no interlocutory proceedings are permitted without consent of the Court and upon proof that such proceedings are in the interests of justice.

The text of the statute does not trace the provenance of this section but it certainly constitutes, whatever its source, a classic example of unfortunate drafting in the area of procedure. Consider the result of the provision as demonstrated in the majority judgment of the Court of Appeal in Nelson Lumber Company Ltd v Integrated Building Corporation Ltd et al [1976] 2 W.W.R. 538. The facts are simple. Nelson filed a materialman's lien against the property of Integrated. Integrated paid into Court the full amount of the claim and then applied to have the lien discharged as having been filed out of time. Meanwhile the action was brought and defended and the defence contained, inter alia, an objection to the amount of the claim. The defence put in issue the amount of the lien but it did not specifically plead that the owner was only liable for 15% of the claim plus that portion of the remaining 85% of the contract price which remained unpaid at the date of the filing of the lien.

Integrated was successful, in Chambers, in having the lien struck down because of late filing. The Appellate Division upheld the Chambers judge. Nelson appealed to the Supreme Court of Canada on the issue of whether or not the lien had been filed in time, and upon that issue was successful: Their Lordships held that the lien was good to the full value of the claim.

Integrated objected that the amount had not been in issue in the lower courts and that it had not had an opportunity of speaking to the point: that no representations had been entertained upon the matter and that, in any case, under the Act, it was only responsible for 15% of the claim plus such sum as should remain payable on the contract at the time of filing. The Supreme Court of Canada refused to rehear the point and Integrated applied to have the issue of quantum decided by the Appellate Division of the Supreme Court of Alberta.

The majority opinion was that the matter had now been disposed of and could not now be reopened. Upon the basis of Section 44 (supra) and, too, in the light of Rule 109, (*) Their Lordships held that the issue of the extent of the owner's liability not exceeding 15% of the claim ought to have been raised in the first instance by Integrated: there ought to have been a specific issue considered in Chambers and in the Appellate Division as to the extent of the liability of Integrated in the event that the Court should find that the lien had been filed in time: and this in the face of Section 45(2) by which, then as now, by Section 44(a) the Legislature has specifically provided that, upon the trial of the action, the Court shall decide 'all questions that are necessary to be tried in order to dispose completely of the action and to adjust the rights and

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(*) Pleading specifically subsequent to statement of claim

109. A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, payment, any statute of limitation, statute of frauds, fraud or any fact showing illegality

(*a*) which he alleges makes any claim or defence of the opposite party not maintainable, or

(*b*) which, if not specifically pleaded, might take the opposite party by surprise, or

(*c*) which raises issues of fact not arising out of the preceding pleading.

liabilities of the parties concerned.

The difficulty arose in this case because the application in respect of time of filing was really an interim, or interlocutory, application in the action and was not intended, in the first instance, to constitute a judicial disposition of the entire controversy. In the result, the owner finds itself with a judgment against it greatly in excess of that which the Act would allow and no recourse.

A roughly contemporaneous line of cases would seem, at first blush, to be at variance with the Nelson Lumber decision: I refer to the judgment of Belzil, J. in Engineered Homes Ltd v Popil [1972] 4 W.W.R. 357 which in turn is based upon the judgment of Justice Riley in Peddlar People Ltd v MacMahon Plastering Co Ltd (1960) 33 W.W.R. 47 which held, inter alia, that payment into court by a party against whom a lien is claimed does not preclude him from disputing the amount of the lien. The Nelson Lumber decision does not deny this basic proposition but it raises difficulties in the path of the defendant and although the old section 44 has now been expunged from the Act it would still be possible, it is submitted, to achieve a like result by advancing the provisions of Rule 109 as was done in Nelson Lumber. Indeed, what Nelson Lumber really says is that unless the provisions of the Statute are pleaded with particularity, the defendant is in danger of having his defence struck out if it rests upon the legislation. And this is a decision of our Court of Appeal.

It is submitted that in its present state the procedure set out in the Act for the resolution of a lien claim resembles nothing so much as an obstacle course. It does not smooth the path of the litigants: it is cumbersome and difficult.

The Popil case decides that the immunity from provincial legislation enjoyed by a federal agency can only be claimed by that federal agency: query whether that immunity, also, would have to be specifically pleaded by C. M. H. C. in a proper case.

With respect, Rule 109 would not seem to go that far, for in terms it is restricted, in respect of legislation, to statutes of limitation and statutes of frauds: but we face the words of the Appellate Division at page 551 of the judgment of the majority in Nelson Lumber in which Justice McDermid quotes the rule and then goes on to say

> .... "This Rule enforces one of the cardinal principles of the present system of pleading, viz., that every defence or reply must plead specifically any matter which makes the claim or defence in the preceding pleading not maintainable or which might take the opposite party by surprise or raises issues of fact not arising out of the preceding pleading. Put shortly, wherever a party has a special ground of defence ... he must specifically plead the matter he relies on for such purpose. ....
> ....
> but the rule does not prevent the Court from giving effect in proper cases to defences which are not pleaded."
> (the italics are mine).

In the result, the Court has stated a principle and has then proceeded to demolish that principle immediately thereafter, leaving the state of things in utter chaos. The pleader is burdened with an intolerable uncertainty as to how far he must specify, in order that the Court do not invoke Rule 109. On the other hand, semble, 'in a proper case' which is not specified, the Court is not bound to give effect to Rule 109.

The procedural effect of the Builders' Lien Act is further complicated by another judicial pronouncement which sets out that, quite apart from the entitlement of a Builder to a lien on the Lien Fund, the enforcement of which involves the invoking of the so-called summary procedure set out in the statute, there is also another distinct right which exists independently by virtue of section 14 of the Act. This is a right which accrues to the purveyor of building materials in respect of those materials after they are delivered at the building site but before they have been incorporated into the building. This separate right accruing to a supplier of material was defined by our Appellate Division in Western Caissons (Alta) Ltd v Bower et al and Amfab Products Ltd, reported at (1970) 71 W.W.R. 604: in which Their Lordships discussed the section, then numbered 16(2) of the Mechanics' Lien Act which has now been incorporated into the Builders' Lien Act as Section 14, without significant alteration.

> 14. (2) Material actually delivered and to be used for any improvement
> (a) is subject to a charge in favour of the person furnishing the material until incorporated in the improvement, and
> (b) is not subject to execution or other process to enforce a debt other than a debt for the purchase of the material due to the person furnishing the material. [1970, c. 14, s. 14]

In the Western Caissons decision His Lordship points out that the section was considered in Ontario, where it was held by the Ontario court in Re: Northlands Grading Co. [1960] O.R. 455 that no additional right accrues to the materialman by virtue of a similar provision. However, in John Wood Co. v Canadian Credit Men's Trust Association (Trustee in Bankruptcy of Brown-Plotke Eng. and Const. Ltd.) (1962) 39 W.W.R. 593, 4 C.B.R. (NS) 149, reversing (1962) 38 W.W.R. 34, 3 C.B.R. (NS) 303, our Appellate Division decided that [the present Section 14] continues the unpaid seller's lien as a right in favour of the materialman in respect of material supplied, before the incorporation of such material into the project, such right being separate and distinct from the Builders' Lien defined in Section 4.

The enforcement of the lien, however, which was also discussed in the same judgment, is left undefined. McDermid J.A., at page 607, says

> "I think the question as to the disposal of the materials should be dealt with at the time the court deals with all of the claims and their enforcement".

His Lordship rejected the procedure usual to other miscellaneous liens, whereby the lien claimant proceeds by way of Distress Warrant and seizure. This judicial opinion creates a major difficulty since it is clear that should a material-man wish to take advantage of the lien granted him by Section 14 he can only do so effectively if the Seizure procedure is open to him: it is not, without more, a practical alternative to invoke a lien for materials if those materials are left at the site to be incorporated into the building at the option of the contractor.

It could well be that the reason why the Mechanics' Lien Act (or, as we know it, the Builders' Lien Act) has trodden such a thorny and tortuous course is that the legislature has attempted to inject into a common law atmosphere a concept which is fundamentally alien to it. The common law jurisdictions are uncomfortable with the Builders' Lien action and they demonstrate their discomfort by resorting to technical pretexts for dismissing a claim for lien.

There are, also, under the Builders' Lien Act, a plethora of applications authorized to initiate proceedings apart from the main action itself: an application to pay the lien fund into Court upon Notice and to fix the amount of the lien fund may be launched by Originating Notice of Motion under Section 18; section 35 permits a party to proceed by 'originating notice' for an Order cancelling the lien on payment of security 'or on any proper ground'; and then there is the 'summary application', not otherwise defined, whereby a lien claimant may seek from the court an Order directing that he be given access to documents of contract as may be necessary for his purposes.

The summary procedure authorized under the Builders' Lien Act is a classic demonstration of the proposition that, generally speaking, the Chambers Application is the step-child of the legislature and it has been provided for upon an ad hoc basis to its detriment. In the result, the summary procedure, so-called, becomes infinitely more complicated than an ordinary action and is hedged about with unusual requirements and pitfalls which do not normally obtain. For this reason the writer would strongly contend for a thorough review of the summary procedure as a whole, which procedure might then be applied to Builders' Liens.

SUMMARY OF APPENDIX 1 - BUILDERS' LIENS

Works on Builders' Liens generally tend to confuse more than to assist the practitioner in that they draw indiscriminately from various jurisdictions. They are therefore of limited practical value.

The Builders' Lien procedure is divergent from the usual course of litigation. McDermid, J.A., points out in Driden Industries [1974] 3 W.W.R. 368, that it is also incomplete: that when an application is made to pay in, the payer ought also to apply to have the issue settled.

My paper suggests that this is not realistic, since the prosecution of the action should fall upon the lienholder.

There are alternative procedures under the Act, which further complicate the picture: these are applications brought by Originating Notice, by the Owner, for cancellation of the lien.

The Western Caissons case [(1970) 71 W.W.R. 604] holds that a further and distinct lien exists in favour of a materialman by virtue of Section 14: but the case fails to indicate how the lien is to be implemented and rules out the normal recourse of Distress and Seizure.

CONCLUSION: the procedure which was instituted to simplify resolution of a lien claim is cumbersome and complicated. It has been repeatedly amended upon an ad hoc basis, and is unsatisfactory. My contention is that the summary procedure generally should be standardized and simplified and made to apply to Builders' Liens as to other summary proceedings.

Statute or Rule	Section	Application		Type	Originating Document	Forum	Ref	Cross-Ref	Sched I page 1
Administration of Estates Act RSA 1970 c 1	11(3)	Where multiple applications for administration or guardianship, any applicant may apply and the Ct QB will decide between them	2	adjudication	ONM	QB Ct	II/1		
	16	Application to reduce or extend Caveat or to file further Caveat notwithstanding 16(2)	9	mitigation		j QB/Sur	II/1		
	17	Motion calling on a Caveator [in an estate] to show why his caveat should not be discharged	4	show cause	NM		II/2		
	21(3)	In small estates, application for payment out of moneys held by the Province	10	distribution		QB/Sur Ct	II/3		
	32(1)	Application for an Order restraining any person from meddling with estate property	3	injunction	ONM	QB Ct	II/4		
	34	Application for change in bond after grant	7	admin sanc		j	II/4		
	35	Proceedings on bond where condition broken [with leave of the court only]	2	adjudication	ONM	j	II/4		
	42(6)	Application by pers rep for an Order directing secured creditor to value security or be barred	4	show cause	Sum appl'n	j	II/5		
	43(2)	Application by claimant for Order allowing his claim and determining the amount of it	2	adjudication	motion	j	II/6		
	67	Application for the opinion, advice or directions of a judge respecting estate matters	5	adv & dir	ONM	j QB/Sur	II/7		
Agrologists Act RSA 1970 c 10	28(1)	Appeal from expulsion from the Institute	1	appeal		j QB Ct	II/9		
Alimony Orders Enforcement Act RSA 1970 c 17	passim	Summons requiring the respondent to appear and show cause why he has not paid	4	show cause	summons [prescribed]	j QB Ct/Ch	II/10		
Arbitration Act RSA 1970 c 21	3(a)	Application for leave to revoke a submission	9	mitigation		j QB/Ct	II/12		
	5(2)	Application for order appointing arbitrator	7	admin sanc		j QB/Ct	II/12		
	6(2)	Application to set aside appointment	3	injunction		j QB/Ct	II/13		
	9	Application for enlarging time for award	9	mitigation		j QB/Ct	II/14		
	11(1)	Application to remove arbitrator for misconduct	3	injunction		j QB/Ct	II/14		
	11(2)	Application to set aside award of arbitrator for misconduct of arbitrator or improper procuring of award	3	injunction		QB Ct	II/14		
	12	Application to enforce award as judgment	2	adjudication		Ct/j	II/14		

Statute or Rule	Section	Application		Type	Originating Document	Forum	Ref	Cross-Ref	Sched I page 2
[Arbitration Act]	13	Application for Habeas Corpus ad testificandem for a prisoner	3	prerog writ		Ct/j	II/14		
	14	Reference on a question of law	5	adv dir		Ct/j	II/15		
Assignment of Book Debts Act RSA 1970 c 25 am	10(1)	Application for Order permitting registration notwithstanding defective proof of execution	8	fiat		j Ct QB	II/15		
	12(1)	Application for an Order permitting rectification of omission or misstatement	8	fiat		j Ct QB	II/16		
Bills of Sale Act RSA 1970 c 29	18	Application for Order permitting registration of Bill of sale notwithstanding defective proof of execution	8	fiat		j Ct QB	II/17		
	24	Application for an Order permitting rectification of omission or misstatement	8	fiat		j Ct QB	II/17		
Builders' Lien Act, RSA 1970 c 35	passim	Summary procedure for proving lien	2	adjudication	S/C				
	18(2)(b) 18(5)(b)	Application to pay the lien fund into Court on notice as provided in s 37(1) and to fix the amount of the lien fund	5	adv dir	ONM	Ct	II/21		
	24(5)	Application for Order directing respondent to allow lienholder to inspect contracts	3	injunction	sum appl'n	Ct	II/20		
	35	Application for Order cancelling lien on pay't of security or 'on any proper ground'	2	adjudication	ON	Ct	II/22		
Bulk Sales Act RSA 1970 c 37	13	Application for the appointment of a trustee to receive the proceeds of sale of stock	7	admin sanc		j QB	II/23		
Cemeteries Act RSA 1970 c 39	43/59(1)	Passing of accounts by owner of Cemetery or Mausoleum (every five years)	6	rev & app		j QB	II/23		
Change of Name Act SA 1973 c 63	11	Application for Order authorizing change of name notwithstanding failure of consent	8	fiat	Petition (s 26)	Ct QB	II/23		
	13	Application to dispense with advertising	8	fiat	Petition	Ct QB	II/24		
	21	Application for Order directing implementation of a change of name	8	fiat	Petition	Ct QB	II/24		
Chartered Accountants Act SA 1971 c 13	44(1)	Appeal from a finding by Council of Conduct Unbecoming a CA and/or punishment	1	appeal	Notice of Appeal	C A	II/25		

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Sched I page 3
Chartered Physiotherapists Act RSA 1970 c 43	17(1)	Appeal from suspension or expulsion from the Association	1	appeal		Ct QB	II/26		
Child Welfare Act RSA 1970 c 45	50	Application for the adoption of a child	7	admin sanc	Petition	j QB	II/26		
	26.1	Application for an order varying the sums ordered to be paid to the Director for the support of a neglected child.	2	adjudication		j FCt	II/28		
	27	Appeal from order of Wardship	1	appeal	not of app	j Ct QB	II/28		
Chiropractic Profession Act RSA 1970 c 46	8(3)	Appeal from decision of council suspending or cancelling registration of a member	1	appeal	ON	j Ct QB	II/31		
	12(3)	Appeal from refusal of Council to register applicant as a member	1	appeal		j Ct QB	II/31		
City Transportation Act RSA 1970 c 47	18	Appeal from decision of the Protection Area Appeal Board by 'a person affected'	1	appeal	not of appl'n for leave	C A	II/32		
Collection Practices Act SA 78 c 47	16(7)	Appeal from adverse decision by Appeal Bd re Collection Agency license application	1	appeal	ON	Ct QB	II/32		
Companies Act RSA 1970 c 60 am	12	Appeal from decision of Registrar re name of company 'by a person aggrieved'	1	appeal	ONM	Ct	II/33		
	34	Application for Order confirming resolution altering the objects of the Company	7	admin sanc		Ct	II/33		
	40	Application for Order confirming special resolution of Company altering or reorganizing or reducing its share capital	7	admin sanc		Ct	II/34		
	41(2)(b)	Application by a creditor ignorant of share capital reduction, for an Order for relief from his loss suffered as a result of it	2	adjudication			II/34		
	41.6	Application by the Securities Commission or by 'any person interested' to force compliance by a company with legislation in purchasing its own shares	3	injunction	ON	Ct	II/35		
	48.1	Application for relief from consequences of inadvertent failure to comply with bylaws re annual return or minimum membership	9	mitigation		Ct	II/36		
	55 (1/4)	Application to rectify the Register	3	injunction		Ct	II/37		

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref
[Companies Act]	98(1)	Application to extend time for registration and/or for rectification of register of Mtges	8	fiat		Ct	II/37	
	101(2)	Application for an Order directing a Company to permit inspection of its mortgage register	3	injunction			II/38	
	116(6)	Application for Order appointing auditor	3	injunction			II/38	
	133(6)	Application for Order directing gen meeting	3	injunction			II/38	
	135(2)	Application for Order directing meeting, albeit contrary to bylaws and the Act	9	mitigation			II/38	
	138(2)	Application for Order exempting any person from compliance with ss 140/141(1) re proxies	9	mitigation		designated j	II/39	
	154(2)& 155(2)	Application for Order calling creditors' meeting to approve reconstruction of Company pursuant to compromise arrangement	7	adm sanc	application in a summary way	Ct	II/40	
	160(1)	Application by 1/10 issued capital for appointment of inspector to investigate affairs of Co	3	injunction		Ct	II/41	
	189	Application to restore Co to register	9	mitigation		Ct		
	197/199	Application for Winding up (& s. 216, 217, 209 and see S.C. Rules 754 and following)	7	adm sanc	Petition	Ct	II/43	
	243/251	Where no liquidator, Court may appoint, or remove liquidator on appl'n by contributory or creditors	7	adm sanc		Ct	II/45	
	256	Application for the 'determination of any question' in the course of a voluntary winding up	5	adv & dir		Ct	II/45	
	257	Appeal against compromise arrangement	2	adjudication			II/46	
	270(1)	Application to compel director to compensate Company	2	adjudication		Ct	II/46	
	272(1)	Application for Order declaring dissolution void	9	mitigation		Ct	II/47	
	277(6)	Application by third party for rescission of contract with the company	9	mitigation		Ct	II/47	
	277(1/5	Application for leave to disclaim Company property, the incidents of which are onerous	9	mitigation		Ct	II/47	

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref
[Companies Act]	277(7/8	Application by a person claiming an interest in property disclaimed by a Company	2	adjudication		Ct	II/47	
Conditional Sales Act, RSA 1970 c 61 am 1973	13	Application for an Order permitting rectification of omission or misstatement of Contract on terms	8	fiat				
Condominium Property Act RSA 1970 c 62	16(2)	Application for the appointment of the Public Trustee or some other person to vote share	7	adm sanc	Petition	Ct QB	II/48	
	28	Application for the appointment of Administrator	7	adm sanc	Petition	Ct QB	II/48	
	31	Application to terminate the condominium status of a building	7	adm sanc	Petition	Ct QB	II/49	
	34	Application for Dissolution of Condominium Corporation	7	adm sanc	Petition	Ct QB	II/49	
Controverted Elections Act RSA 1970 c 66	3	Application of defeated candidate or elector in appropriate electoral division for Order quashing the election of an M L A	3	prerog writ	Petition [prescribed]	Ct QB	II/50	
Co-Operative Associations Act RSA 1970 c 67 am	28(3)	Where it is impracticable to call a meeting in accordance with bylaws, application for directions as to manner of calling meeting	9	mitigation		j Ct QB	II/51	
	48	Application by liquidator to fix remuneration	6	rev & app		j Ct QB	II/51	
	49	Application by liquidator for directions relating to filing his accounts	6	rev & app		j Ct QB	II/51	
Credit Union Act RSA 1970 c 74	75(12)	Application for directions relating to filing liquidator's accounts and fixing day for hearing and approval of accounts	6	rev & app		j Ct QB	II/51	
Criminal Injuries Compensation Act RSA 1970 c 75	22	Appeal from an Order of the Crimes Compensation Board on a question of law or jurisdiction	1	appeal		C A	II/52	
Crop Payments Act RSA 1970 c 77	6(1)	Application for relief from payments (does not apply to irrigated lands, see c 78 s 8)	9	mitigation		j Ct QB	II/52	
Dental Association Act RSA 1970 c 90	43(1)	Application by way of appeal from a suspension or removal from the register	1	appeal	Notice of Appeal	j QB Ch	II/53	

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref
Dental Auxiliaries Act RSA 1970 c 91	14(1)	Appeal from suspension or removal from the register	1	appeal	Notice of Appeal	j Ct QB	II/53	
Dental Mechanics Act RSA 1970 c 92	14(6)	Appeal from suspension or expulsion from the society	1	appeal		j Ct QB	II/54	
Dependent Adults Act SA 1976 c 63	2(1)	Application by 'any interested person' (defined in s 1(i) for appointment of guardian for a dependent adult	7	admin sanc		Sur Ct	II/54	
	15(1)	Application for review of guardianship order	2	adjudication		Sur Ct	II/55	
	21(1)	Application by 'any interested person' for appointment of a trustee for the estate of a dependent adult	7	adm sanc		Sur Ct	II/55	
	67 (1)	Appeal from guardianship order	1	appeal	ON	Ct QB	II/55	
Devolution of Real Property Act RSA 1970 c 109	9(3)	Application to compel the personal representative of a deceased to convey to beneficiary or to sell real property	3	injunction		Ct	II/56	
	11(1)	Application for an Order binding contingent interests and dependent adults' interests, non-concurring adults and infants in respect of a sale or option of estate land	7	adm sanc		Ct	II/57	
	15(1)	Application for an Order approving lease in excess of one year, or mortgage of realty	7	adm sanc		Ct	II/59	
Domestic Relations Act RSA 1970 c 113 am 1973 c 61 s 13	27(6) (b)	Appeal from a protection order of a family court judge	1	appeal	See Crim C. Part XXIV	Ct QB	II/60	
	42	Application by or for infant, for the appointment of a guardian	7	adm sanc		QB/Sur Ct	II/61	
	43(1)	Application for removal of guardian	3	injunction		QB	II/61	
	43(2)	Application by a guardian for leave to resign his charge	7	adm sanc		Ct	II/62	
	45(2) & 46	Application for custody and/or right of Access	2	adjudication		Ct QB / j Sur Ct/Ch	II/62	
	47(2)	Application for the production of a child	3	prerog writ		Ct	II/63	
	26	Application for Order varying Alimony or Maintenance	2	adjudication		Ct	II/63	

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref
Dower Act, R.S.A. 1970 c. 114	11/23(1)	Application for an Order dispensing with the consent of a spouse to a disposition, by a living spouse or estate of a deceased spouse	2	adjudication	NM	j	II/64	
	14(1)	Application by judgment creditor spouse who has recovered damages, for payment out of the Assurance Fund (see ss 15, 16, 17, 18, 25(3))	10	distribution	ON	j QB	II/66	
	20(4)	Application for Order designating homestead	5	adv & dir	NM	j	II/65	
	24(2)	Application for Order designating personal property of sec'd which is subject to dower	5	adv & dir	NM	j	II/65	
Drainage Districts Act RSA 1970 c 115	154	Appeal against decision of Court of Revision on a complaint or against the omission, neglect or refusal of the court to hear complaint	1	appeal	notice of intention to appeal	j QB	II/67	
Election Act RSA 1970 c 117	104	Application for an Order in the nature of Mandamus where returning officer neglects or refuses to add votes or cast deciding vote	2	injunction	notice (s 104(2))	j Ct QB	II/68	
	108	Appeal from the decision of a Provincial Judge on recount or final addition	1	appeal	notice of intention	j Ct QB	II/69	
	160	Approval of late claims against a candidate in an election, notwithstanding s. 159	9	mitigation			II/69	
Engineering & Related Professions Act RSA 1970 c 124	20(5)	Appeal against refusal of Council to register appellant because he failed to satisfy council as to his good character	1	appeal	notice of appeal (20(6)	j Ct QB	II/69	
	44	Appeal against fine, suspension or striking from the register or revoking permit	1	appeal	notice of appeal	Ct QB	II/70	
Execution Creditors Act RSA 1970 c 128	18/26	Summary procedure for the adjudication of a claim against an Execution Debtor	2	adjudication	notice (prescribed)	j	II/70	
	31	Application to contest Sheriff's scheme for distribution of moneys realized	2	adjudication	notice (prescribed)	j	II/71	
Exemptions Act RSA 1970 c 129	8(2)	Application by a Creditor for an Order declaring any specified goods not exempt	2	adjudication	NM	j	II/73	
Expropriation Act SA 1974 c 27	28(3)	Application to have compensation for expropriated land fixed by the Court	2	adjudication	(see s. 27)	Ct	II/73	

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Sched I page 8
Family Relief Act RSA 1970 c 134	4 14(2)	Application for provision for proper maintenance and support by wife or child or by committee of a dependant	2	adjudication	ON (s 14(1))	j	II/74 II/78		
	20	Application for interim order for the preservation of estate until the application has been finally disposed of	3	injunction			II/77		
Fatal Accidents Act RSA 1970 c 138	6(1) and(2)	On the application of any party intending to bring or continue an action, an Order appointing an Administrator ad Litem	7	adm sanc		j Ct QB	II/79		
Firefighters & Policemen Labour Relations Act RSA 1970 c 143	18(1)	Reference to a judge of QB by 'either party' to the collective agreement of any question as to application, interpretation or alleged violation of agreement re policeman	5	adv & dir	NM	j Ct QB	II/79		
Fire Prevention Act RSA 1970 c 144	24(3)	Appeal from an Order to alter, repair, remove or destroy or to alter use or occupancy of premises (from Fire Commissioner)	1	appeal	petition	j Ct QB	II/80		
Fish Marketing Act RSA 1970 c 145	5(3)	Appeal from Order of Minister re compensation to applicant for reduncancy of plant or equipment caused by formation of Freshwater Fish Marketing Corporation	1	appeal	ONM	j Ct QB	II/80		
Garagemen's Lien Act, RSA 1970 c 155	7(3)	Application for extension of time for making a seizure of a vehicle under the Act	9	mitigation	ex parte	j	II/81		
Individual Rights Protection Act SA 1972 c 2	22/23	Appeal by the Attorney-General or appeal by complainant from the decision of the Board of Inquiry	1	appeal	ONM	Ct QB	II/81		
	24	Application by the AG for an Order further to the Order granted under s. 23, enjoining the respondent from continuing conduct	3	injunction	ONM	Ct QB	II/82		
Infants Act RSA 1970 c 185	2(1)	Application for an Order permitting sale or lease of infant's land	7	adm sanc		Ct QB	II/83		
	9	Application for an Order for the payment of maintenance out of a life estate with power of appointment in favour of child	7	adm sanc		Ct QB	II/84		
	10	Application for an Order directing that stock dividends be paid to guardian for benefit of infant owner	7	adm sanc		Ct QB	II/84		

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Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref
[Infants Act]	16(1)	Application for an Order confirming the settlement of an action or a claim in tort in favour of an infant	6	rev & app	ONM (if no action commenced)	j Ct QB in Ch	II/85	
Insurance Act RSA 1970 c 187 [Part 6 - LIFE]	266	Application for a declaration as to the sufficiency of evidence furnished in respect of a proof of claim under a Life contract	8	certificate		Ct	II/87	
	267	Application for a Declaration of Presumption of Death / see also Marriage Act	8	certificate		Ct	II/87	see Family Relief Act
	272	Application by Insurer for Payment into Court of insurance proceeds	7	adm sanc	ex parte	Ct	II/88	
	274(2)	Order for commutation of instalments of proceeds of policy (beneficiary's application)	7	adm sanc		Ct	II/88	
	276	Order for payment into Court by insurer of insurance moneys under contract upon the application of 'any person'	3	injunction		Ct	II/89	
Intestate Succession Act, RSA 1970 c 190	16(1)	Application by child or personal representative for Order confirming right of illegitimate child to inherit from deceased	8	certificate		Ct QB/j	II/89	
Investment Contracts Act RSA 1970 c 191	21	Appeal from a direction respecting licensing of an issuer or salesman of investment contracts	1	appeal	NM	C A	II/90	
Irrigation Act RSA 1970 c 192	35	Application by a water user or a Board for a declaration that a director is not qualified	3	injunction	ONM	Ct QB	II/91	
Alberta Labour Act SA 1973 c 33	131	Application for an interim injunction in case of a strike or lockout: NOT to be granted ex parte.	3	injunction	NM	Ct QB	II/91	
Land Surveyors' Act RSA 1970 c 197	50(1)	Appeal from a finding of guilty of conduct unbecoming an Alberta Land Surveyor	1	appeal	ONM	Ct QB	II/91	
Land Titles Act RSA 1970 c 198 as amended	39/41	Application by owner to bring land under the operation of the Land Titles Act, where a question of interest in land arises: Registrar refers the matter to 'a judge': and application for the adjudication of an adverse claim on such an application	2	adjudication	Form 7 Sched A	j	II/93	
Judicature Act RSA 1970 c.198 am. SA 1975 c.43	22.1	Application to restrain vexatious proceedings	3	injunction	O.N.			

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Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Sched 1 page 10
[Land Titles Act]	59	Application for an Order permitting registration of a copy of an instrument, the original having been filed in the other Land Titles Ofc	8	fiat		j Ct QB	II/93		
	110 (1) (b)	Application for a certificate that moneys due on a mortgage or encumbrance are paid & no taxes due the P of A	8	certificate		j	II/94		
	110(1) (c)	Application for a certificate that a Mortgage is extinguished by Limitation	8	certificate		j	II/94		
	111	Application for an Order directing a memorandum of satisfaction of annuity against title	8	certificate		j	II/94		
	113(1)	Application for an Order, where a receipt for payment of the balance of a mortgage cannot be given, directing payment to a bank	7	adm sanc		j	II/95		
	113(2)	Application for an Order establishing the balance due on a mortgage for the purpose of payment to a bank where a dispute arises as to the amount owing	2	adjudication		j	II/95		
	125(2)	Application to have a trustee (holding land) removed and another trustee appointed	3	injunction		Ct/j	II/96		
	126(1) (c)	Application for an Order authorizing a transfer, mortgage or other instrument by a personal representative notwithstanding that there are infants interested and there is no consent by the Public Trustee	7	adm sanc		j	II/96		
	129	Application for an Order directing discharge of a Writ of Execution against land	8	certificate		j	II/97		
	131/133	Confirmation of sale of land under process of law (otherwise the sale is void)	7	adm sanc		Ct/j	II/97		
	144(2)	Application for an Order shortening the time for taking proceedings on a Caveat	9	mitigation	ex parte	Ct/j	II/98		
	145	Application for an Order extending the time for taking proceedings upon a Caveat	9	mitigation	NM	j	II/98		
	146(1)	Application by 'applicant or owner' calling on Caveator to show cause why his Caveat should not be discharged	4	show cause	ON	Ct/j	II/98		

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Sched I page 11
[Land Titles Act]	146(2)	Application for certificate of payment of moneys due under equitable mortgage or encumbrance registered by way of Caveat and that no taxes are due to the P of A	8	certificate		j	II/99		
	150	Application for an Order permitting filing a new Caveat notwithstanding previous filing in the same matter	9	mitigation			II/100		
	151	Application by applicant or owner for Order that a Registrar's Caveat be withdrawn	3	prerog	ON	Ct/j	II/98		
	159(2)	Application for a fiat authorizing registration of an instrument notwithstanding defective proof of its execution	8	fiat					
	181	Appeal from any decision of the Registrar	1	appeal	petition	j Ct QB	II/101		
	183	Application for relief where improvements have been made on land in error	2	adjudication		Ct	II/101		
	188(2)	Application for an Order cancelling certificate of title where the Owner is dead or missing	8	certificate		j	II/102		
	190(6)	Application for security for costs against out of Province encumbrancer	3	injunction	NM/sometimes interlocutory	j	II/103		
	205(3)	Application for Order authorizing dealing with land by joint trustee notwithstanding failure of execution by all trustees registered	8	fiat		Ct/j	II/104		
Landlord & Tenant Act SA 1978 c 65	11(1)	Application by landlord for an Order for possession of premises against overholding tenant	2	adjudication	ON (s. 47)	prov'l Ct or Ct QB (S. 1(c))	II/105		
	22	Application by landlord to recover rent and damages where a tenant has repudiated lease	2	adjudication	ON (s 47)		II/10 5		
	24(2)	Application by landlord upon breach of tenancy - for termination, damages & possession	2	adjudication	see s 24 ON (procedure)		II/106		
	21(1)	Application by tenant for damages, abatement of rent, compensation and/or termination	2	adjudication	ON		II/107		
Landmen Licensing Act, RSA 1970 c202	21	Appeal from the decision of an investigating committee either by Landman or Complain't	1	appeal			II/107		

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Sched I page 12
Legal Profession Act RSA 1970 c203	70	Appeal from a finding of conduct unbecoming a Barrister and/or from punishment imposed	1	appeal	notice of appeal	C A	II/108		
The Libraries Act RSA 1970 c 206		Applications for orders declaring Library Boards to be dissolved	7	adm sanc	ex parte	j Ct QB	II/108		
Local Authorities Board Act RSA 1970 c 218		This Act sets up a forum distinct from but equal in power to the Ct of Queen's Bench Appeals are to the C A by leave	1	appeal		C A	II/108		
Maintenance & Recovery Act RSA 1970 c 223 am	22	Application to vary an order or agreement made under the Act: may be brought by mother, father or Director	2	adjudication	Act s 5(1)(b) see p II/110	j	II/109		
Marriage Act RSA 1970 c 226	19(1)	Application for an order permitting the marriage of the applicant, notwithstanding no consent by parent or guardian	7	adm sanc	'notice' (s 19 Act)	j Ct QB	II/111		
	20(1)	Application for an Order presuming death of a spouse	8	certificate	Petition	Ct QB	II/111		
Marketing of Agricultural Products Act RSA 1970 c 225	26.1	Appeal by producer, the Council having notified him under section 26.1(1) that it refuses to hear the appeal and advises him to take his appeal to the Court	1	appeal	ON	Ct QB	II/112		
Matrimonial Property Act SA 1978 c 22	19(1) (a)	Application for possession of the matrimonial home	2	adjudication	ON or see s 30(1)	Ct	II/113		
	19(1) (b)	Application for an injunction restraining a spouse from entering the matrimonial home	3	injunction	ON or see s 30(1)	Ct	II/114		
	25(1)	Application for use and enjoyment of household goods	2	adjudication	ON or see s 30(1)	Ct	II/114		
	29(1)	Application for an Order directing the cancellation of registration of Orders registered pursuant to ss 22, 23 or 26	2	adjudication	ON or see s 30(1)	Ct	II/114		
	34(1)	Application to restrain the transfer by a spouse of property to defeat a claim under the Act	3	injunction	ON / ex parte	Ct	II/115		
Medical Profession Act SA 1975 c 26	58(1)	Appeal from a decision of the Council imposing penalties upon a member	1	appeal	notice of appeal	C A	II/115		

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Sched I page 13
Mental Health Act SA 1972 c 118	46(1)	Appeal from a decision of a review panel finding incapacity (s 46 prescribes notice and procedure)	1	appeal	ONM	Ct QB	II/116		
Mortgage Brokers Regulation Act RSA 1970 c 242 am	24(7)	Appeal from the decision of an appeal board respecting the registration of a mortgage broker	1	appeal	ON	Ct QB	II/117		
Municipal Election Act RSA 1970 c 245	132(1)	Application for judicial recount by any elector	1		NM	Ct QB	II/118		
	157/179	Motion in the nature of Quo Warranto where bribery is alleged; preliminary fiat required or by reason of some other irregularity a member should forfeit his seat	3	prerog writ	NM		II/118		
Municipal Gov't Act RSA 1970 c246	32	Application by an elector for an Order declaring a member of Council not qualified	3	prerog writ	ex parte	j Ct QB	II/119		
	157	Appeal by occupier who receives a notice to abate a nuisance (council acting unreasonably	1	appeal		Ct QB	II/120		
	158(7)	Appeal by owner or occupier from demolition Order	1	appeal		Ct QB	II/121		
	397	Application to quash by-law, order or resolution for illegality	3	injunction	NM	j Ct QB	II/121		
	398	Application to quash by-law procured through or by means of bribery	3	prerog writ	see c 245 ss 157/179 supra		II/118 II/124		
	405	Application by Council for an injunction to stop the erection of a building or any land use in contravention of a Bylaw	3	injunction	ON	j	II/124		
Naturopathy Act RSA 1970 c 257	8(8)	Appeal from a decision of the council expelling or suspending a member	1	appeal		j Ct QB	II/125		
Occupational Health and Safety Act SA 1976 c 40	11(5)	Appeal upon a question of law or jurisdiction from an Order made by the Council	1	appeal	ON	Ct QB	II/125		
Oil & Gas Conservation Act RSA 1970 c 267	76(1)	Under this Act appeals and references to the Court are limited to questions of law and jurisdiction under 124(1) by leave only	1	appeal			II/126		
Opthalmic Dispensers Act RSA 1970 c 269	28/29	Appeal from suspension or removal from practice by the Council	1	appeal	ONM	j QB/Ch	II/126		

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref
Optometry Act RSA 1970 c 270	9	Appeal re validity of election of officers 'to be held by a judge in chambers in a summary way'	3	prerog writ	petition	Ct QB	II/127	
	30	Appeal from a finding of conduct unbecoming an optometrist and consequential order (s 17)	1	appeal	ONM	Ct QB	II/127	
Partnership Act RSA 1970 c 271	25	Application for an Order charging the interest of a partner with his personal debt	2	adjudication	NM	Ct QB/j	II/128	
	38(1)	Application for dissolution of partnership	2	adjudication		Ct	II/129	
	42(2)	Application on dissolution by any partner to wind up the business and affairs of the firm	2	adjudication			II/130	
	57(c)	Application by limited partner for winding-up	2	adjudication			II/130	
	75(1)	Application by a creditor of a limited partner for an Order charging the interest of the limited partner with his debt	2	adjudication			II/130	
	70	Application for an Order directing cancellation or amendment of Limited Partnership Certificate	3	injunction		Ct	II/131	
Pharmaceutical Association Act RSA 1970 c 274	26	Appeal from suspension or expulsion from the Association's register	1	appeal	notice of motion	j CtQBch	II/131	
Planning Act S A 1977 c 89	146/147	Appeals are limited by the Act to questions of Law or Jurisdiction	1	appeal	appl'n for leave	C A	II/132	
Podiatry Act RSA 1970 c 277	13	Appeal from expulsion or suspension from the register	1	appeal		j QB ch	II/133	
Possessory Liens Act RSA 1970 c279	9	Application for Order for Sale of perishable goods	7	adm sanc		j	II/134	
	10(2)(c)	Application for leave to sell chattels	2	adjudication	see s 10(4)	j	II/134	
Psychiatric Nurses Association Act RSA 1970 c 289	15	Appeal from suspension or expulsion	1	appeal		j Ct QB	II/135	
Psychiatric Nursing Training Act RSA 1970 c 290	5(2)	Appeal from cancellation of certificate	1	appeal	ON	Ct QB	II/135	
Psychologists Act RSA 1970 c 291	21(1)	Appeal from suspension or cancellation of certificate	1	appeal	ONM	Ct QB	II/135	

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Sched I page 15
Public Highways Development Act RSA 1970 c 295	27(6)	Any person aggrieved by an Order of the Minister directing removal of a structure, demolition, etc, may appeal: appeal very limited	1	appeal		Ct QB	II/136	II/80 II/121	
	43	Application for adjudication by the Court in regard to compensation where the owner of land is dissatisfied with the amount proposed	2	adjudication	ONM	Ct QB	II/136	II/73	
Public Trustee Act RSA 1970 c 301	10	Application for an Order declaring a person to be a 'missing person'	8	certificate		j Ct QB	II/137		
	32	Application by 'a person' for an Order appointing the P Tee a judicial trustee under Trustee Act	7	admin sanc		Ct	II/137		
Public Utilities Bd Act RSA 1970 c 302	62	Appeal from the Public Utilities Board is limited to a question of law or jurisdiction	1	appeal		j C A	II/138		
Reciprocal Enforcement of Judgment Act RSA 1970 c312 Rules 730-736	3(2)	Application to register a judgment first option: subject to attack (*)	4	show cause	ex parte	Ct QB	II/139		
	3(5)	Application to register a judgment second option: on notice and not subject to *	4	show cause	ONM	Ct QB	II/143		
	3(6)7(1)	Application by debtor to set aside judgment obtained ex parte (*)	4	show cause	NM	Ct QB	II/141		
Reciprocal Maintenance Orders Act RSA 1970 c 313	5	Application for maintenance order against a person residing in a reciprocating state.	4	show cause	see section 6(1) summons		II/146		
Registered Dietitians Assoc Act RSA 1970 c 315	18(1)	Appeal from suspension or expulsion from the Association by Council	1	appeal		j Ct QB	II/146		
Registered Nurses Act RSA 1970 c 317	10(1)	Appeal from suspension or expulsion from membership in the Association or other discipline	1	appeal	ON	Ct QB	II/146		
Religious Societies Lands Act RSA 1970 c 319 am	27(1)	Application for winding up of Religious Society	7	admin sanc	Petition	j Ct QB	II/147		
	27(4)	Application for directions or determination of any question arising on the winding up of a Religious Corporation and disposition of the property of the religious society	5	adv & dir		j Ct QB	II/147		
	27(5)(b)	Application for an Order governing the disposition of the surplus to the Ultimate Heir	10	distribution	ONM	Ct QB	II/147		

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref
[Religious Societies Lands Act]	9	Sanction of sale of Society's lands	7	admin sanc		j Ct QB	II/146	
School Act RSA 1970 c 329	35	Application ex parte of an elector for an Order declaring a trustee disqualified	3	injunction	ex parte	j Ct QB	II/148	
	4	Application to a judge for an Order declaring a Petition to be sufficient	8	certificate		j	II/148	
School Election Act RSA 1970c331	122/131	Application for recount by a judge	1	appeal	NM	Ct QB	II/149	
Securities Act RSA 1970 c 333	26(2)	Application for directions regarding the disposition of funds	5	adv & dir			II /150	
Seizures Act RSA 1970 c 338	9	Application for an Order for Sale of a Mtge	2	adjudication		j	II/150	
	15	Application for an Order for Sale of Land notwithstanding that a year not expired & no Nulla Bona	2	adjudication		j	II/151	
	29	Application for an Order for Sale of chattels seized under Writ or under Distress	2	adjudication	NM	Ct	II/151	
	39(2)	Application by a creditor or debtor to the Court for directions	5	adv & dir		Ct	II/154	
Social Workers Act RSA 1970 c 346	15	Appeal from order suspending license or reprimanding social worker	1	appeal	ONM	Ct QB	II/155	
Societies Act RSA 1970 c 347	22(2)	Application to enforce a decision made pursuant to an arbitration under Act or Bylaws	3	injunction		Ct QB		
Stray Animals Act SA 1976 c 52	22	Application for an Order to destroy a mischievous dog	3	injunction		prov j	II/156	
Surface Rights Act SA 1972 c 91	24	Appeal from an Order of the Surface Rights Board as to amount of compensation to be paid to the owner of land	1	appeal	notice of appeal	Ct QB	II/156	
Survival of Actions Act SA 1978 c 35	8(1)	Application for the appointment of an Administrator Ad Litem	7	admin sanc		CtQB/Sur	II/157	
Tax Recovery Act RSA 1970 c 360	26	Application to have a sale for taxes halted for non-compliance with the Act	3	injunction		j Ct QB/Ch	II/1	
Trust Companies Act RSA 1970 c372 SA 1975(2) c 85	41(1)	Application for order or judgment adjudicating upon a claim upon a share or obligation of the company, or upon a dividend	2	adjudication	ONM	Ct QB	II/165	
	77	Application by the owner of capital shares requiring Co to commence or continue action	3	injunction		jQB, pers designata	II/165	

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref
[Trust Companies Act]	88	Application for Order to deliver records	3	injunction	Petition	Ct	II/166	
	85	Application for Order to rectify Register of Shareholders	3	injunction	Petition	Ct QB	II/166	
	98	On the filing of an account by a Trust Co (respecting moneys held in trust) 'any person' may be represented	6	rev & app		j Ct QB	II/164	
	133	Application for an Order enforcing the liability of Directors for losses	2	adjudication	ONM	j Ct QB	II/166	
	139(5)	Application for approval of amalgamation agreement	7	admin sanc	Petition	Ct QB	II/165	
Trustee Act, RSA 1970 c 373 am 1973 c 13 s12(2) 1974 c 14 s 7(3)	21	Application for Order conferring power for transaction beyond the power vested in the trustee by the trust instrument	7	admin sanc		Ct QB	II/167	
	37	Application for variation of a trust or for termination of a trust	7	admin sanc	ONM (Rule 410(h))	Ct QB	II/167	
	38	Application for advice 'in the manner prescribed by the Rules of Court'	5	adv & dir	ONM (Rule 410(f))	j QB/ct/ch	II/169	CanCtFms p. 174 2d
	42	Application for the appointment of a judicial trustee	7	admin sanc		ctQB/Sur/j	II/170	
Unconscionable Transactions Act RSA 1970 c 377	3	Application by a debtor for setting aside, in whole or in part, a transaction because the cost of loan is unconscionable	2	adjudication	ONM (s4(b))	Ct	II/171	
Unfair Trade Practices Act SA75c33	10(3)	Application by a supplier for an Order terminating an Undertaking to Director	9	mitigation	ON	Ct	II/172	
Veterinary Surgeons Act RSA 1970 c 382	15(1)	Appeal by Veterinary surgeon from suspension, fine or removal from the register	1	appeal	notice of appeal	j QB	II/172	
Vital Statistics Act RSA 1970 c 384	35	Appeal re refusal of registration by Director of birth, stillbirth, marriage or death	8	certificate		jCt QB	II/173	
Warehouse Receipts Act RSA 1970 c385	10	Where a negotiable receipt has been lost or destroyed, application for delivery of goods to purchaser upon delivery of a bond	8	certificate		jCt QB	II/174	

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Schedule I page 18
Warehousemen's Lien Act RSA 1970 c 386	8(3)	Application for an Order directing a warehouseman to pay proceeds of sale	5	adv & dir					
Woodmen's Lien Act RSA 1970 c 396	passim	ss(10(1)), (7) (21) (23) (32)(24(2)) are procedural; like the Builder's Lien Act this is an Act which establishes a distinct procedure which must be followed to the letter; some of the forms are prescribed in Schedules.	2	adjudication	Statement of Claim but see Act	Ct QB	II/175		
Rules of Court	297(1)	Perpetuating testimony	7	admin sanc	orig notice	ct	II/177		
	383(1)	Motion to set aside a conveyance of property which was made to defraud creditors, and for an order directing sale of the property in question and application of proceeds	4	show cause	'motion'	ct	II/178		
	383(2)	Equitable Execution	2	adjudication	'motion'	ct	II/179		
	410(a)	Proceedings to recover possession of land	2	adjudication	ON	ct	II/180		
	410(b)	Application for appointment of new trustee	3	injunction	ON	ct		II/96, 167, 170	
	410(c)	Proceedings relating to land: (i) for declaration of beneficial interest or a charge on land and its character & extent	2	adjudication	ON	ct		Land Titles Act II/93 & ff I/9 & ff	
		(ii) declaration re priority as between interests or charges	2	adjudication	ON	ct			
		(iii) cancelling or charging title to land	2	adjudication	ON	ct			
	410(e)	Application for construction of a written instrument or statute & declaration of rights	2	adjudication	ON	ct			All [illegible] page 7
	410(f)	Application for advice & directions under the Trustee Act (redundant)	5	adv & dir	ON	ct			
	410(g)	Application to fix the compensation of a Trustee (redundant)	7	admin sanc	ON	ct			
	410(h)	Application for approval of an arrangement for the variation of a trust	7	admin sanc	ON	ct		Trustee Act s. 37 II/169	
	410(i)	Proceedings to compel partition of land	2	adjudication	ON	ct		Partition Act 1979	
	412	Proceedings for the determination of any question or for relief such as could be given in an 'administration proceeding'	2	adjudication	ON	ct			

Statute or Rule	Section	Application	Type		Originating Document	Forum	Ref	Cross-Ref	Schedule 1 page 19
RULES OF COURT	413 (a)	Application for resolution of any question arising in the administration of an estate or in the execution of a trust	5	adv & dir	ON	ct		II/7, 169 & 410(f)	
	413(b)	Application for the resolution of any question as to identity of cestuis que trust/beneficiaries	5	adv & dir	ON	ct		supra	
	413(c)	Application for resolution of questions regarding claims by creditors or other claimants to trust or estate assets	2	adjudication	ON	ct		II/5, II/6	
	414(a)	Application for Order requiring executor, administrator or trustee to pass accounts	3	injunction	ON	ct		Surr. Rules 35 to 39	
	414(b)	Application for Order requiring executor, administrator or trustee to pay into court	3	injunction	ON	ct			
	414(c)	Application for Order requiring a person to do or refrain from an act as trustee	3	injunction	ON	ct			
	414(d)	Application for an Order approving sale, purchase, compromise	7	admin sanc	ON	ct			
	414(e)	Application for a directive by the Court as though estate or trust were being administered by the Court	3	injunction	ON	ct			
	331	Application for renewal of judgment	4	show cause	notice of m.	ct	II/197		
	437/439	Mandamus	3	injunction	notice of m.				
	440	Injunction	3	injunction	notice of m.				
	441	Prohibition	3	injunction	notice of m.				

ADMINISTRATION OF ESTATES ACT, R.S.A. 1970, c.1

Where multiple applications for administration or guardianship, any applicant may apply and the Court of Queen's Bench will determine which application shall be proceeded with.

Section 11(3) Any of the applicants may apply by originating notice of motion to the Court of Queen's Bench for directions and that Court shall inquire into the matter in a summary way and give directions as to which court is to have jurisdiction in the matter and which application is to be proceeded with.

(5) The order of the Court of Queen's Bench is final and conclusive and the clerk of the Court of Queen's Bench shall transmit a certified copy of the order to each clerk in whose office the applications for grants were filed.

[1969, c. 2, s. 11)
[1978, c. 51, s. 28]

See also Supreme Court Rule 861 and Surrogate Court Rule 25

Jurisdiction - the Court of Queen's Bench
Originating document - originating notice of motion (s. 11(3))
Applicant - any one of the applicants for administration or guardianship whose name appears on the certificate provided for in s. 9
Respondent - not provided for
Notice - not provided for
No directions as to law or evidence
No cases.

Application to reduce or extend Caveat or to file further Caveat notwithstanding the provisions of section 16(2)

Section 16 (1) Unless it is sooner withdrawn or discharged, a caveat remains in force for three months from the date it is filed or such shorter or longer period as may be ordered by a judge.

(2) Where a caveat has expired or has been withdrawn or discharged, no further caveat in respect of the same estate or infant shall be filed by or on behalf of the same caveator without the leave of a judge. [1969, c. 2, s. 16]

Caveat is defined and described, Act, ss. 12-15, inclusive

Judge, Act, s. 2(f) is a judge of a surrogate court or a judge of the Court of Queen's Bench.

Contentious Business as defined in the Surrogate Court Rules (R. 25) includes (b) proceedings in which the right to obtain or retain a grant is in dispute and (c) proceedings to discharge a caveat, but does not include proceedings for the extension of a caveat or proceedings to obtain leave to file a further caveat.

The Surrogate Rules direct that all contentious business shall be begun by way of originating notice before the judge in chambers: but semble this application does not fall within the purview of Surrogate Rule 25.

Nothing in the section specifically gives the right to appear in chambers on the application nor is the form of application defined in the Act.

Motion calling upon a Caveator to show cause why his Caveat should not be discharged.

Section 17 Any person whose application for a grant is affected by a caveat may serve notice of motion returnable not less than five days after service, calling upon the caveator to show cause why it should not be discharged. [1969, c. 2, s. 17]

Surrogate Rule 25 specifically states
(1) all contentious business shall be begun by way of originating notice before the judge in chambers;
(2) "contentious business" means
....
(c) proceedings to discharge a caveat.

The Statute is paramount.

The Statute provides for no specific jurisdiction and there is therefore no clear right to appear in the Surrogate Court, nor in chambers.

The Applicant is defined in the Section, as is the Respondent, the Caveator. Section 18 provides for service of the Notice by registered mail at the address for service set out in the Caveat. Time for service is 5 clear days (not less than).

The form of notice, while the Surrogate Court Rules provide for Originating Notice, is specifically prescribed by the Statute as Notice of Motion "calling upon the caveator to show why the caveat should not be discharged".

In Sanders v Nousek [1975] 3 W.W.R. 125 the Master held that
(i) the originating document should comply with Rule 88 and
(ii) that the Rule (in this case, the Statute) specifically called

upon the respondent to 'show cause' and that the notice of motion must therefore reflect the wording of the Rule (Statute).

Following Sanders v Nousek [1975] 3 W.W.R. 125, therefore, the Notice of Motion should probably contain the words

> "And take notice that you are hereby required to appear in person or by counsel at the above-appointed time and place and then and there to show cause why the order applied for should not be granted."

No cases.

In small estates, application for payment to the applicant of moneys paid to and held by the Province.

Section 21 (1) [Where the estate is under $1,000 the Court may grant a fiat for a certificate in lieu of probate or administration; where the deceased died testate and beneficiaries cannot be found, the balance of the estate is paid into the general revenue fund of the Province. Where subsequently a claim is
(3) proved to the satisfaction of the court, the Provincial Treasurer, upon order of the court, shall pay the claim out of the General Revenue Fund.

Having regard to the sum involved the 'court' must mean the Surrogate Court. The Statute gives no direction as to how the application must be brought and there are no reported cases.

Application for an Order restraining any person from intermeddling with property.

Section 32(1) At any time before the issue of a grant any person may apply to the court by originating notice of motion and upon such notice as the judge may direct, for an order restraining any person from dealing or intermeddling with the property of a deceased person.

"Court" is not defined and because there is in the Court of Queen's Bench the exclusive jurisdiction to grant an Order in the nature of an injunction, semble the application should be made in Queen's Bench.

The prescribed form of application is originating notice of motion;

the motion is specifically returnable in court. However, the section prescribes that service shall be upon such persons as a judge shall direct and in order to receive such direction semble a preliminary application is necessary.

No cases.

Application for a change in bond after grant

Section 34. After the issue of a grant, a judge may, subject to the Rules, permit a bond to be given in a reduced amount or with one surety, accept other security in lieu of the bond given, require the furnishing of other or additional security, cancel a bond and discharge sureties or order the return of any security.

[1969, c. 2, s. 34]

'Rules' mean the Surrogate Court Rules. (Act, s. 2(i))
The application, therefore, is to a Surrogate Court Judge having regard to the provisions of Surrogate Rules 23 and 24.

No cases.

Proceedings on bond where condition broken (taken with leave of the Court only).

Section 35 (1) Any person interested in the estate of a deceased person or an infant may with leave of the court institute proceedings in his own name on a bond without an assignment thereof to him.

(2) The proceedings on the bond shall be made by originating notice of motion and if the judge hearing the motion is satisfied that the condition of the bond has been broken, the person who instituted the proceedings shall recover thereon as trustee for all persons interested in the full amount recoverable in respect of any breach of the condition of the bond.

[1969, c. 2, s. 35]

There are no Alberta cases on the section and therefore it is not clear whether before bringing an application under Section 35 it is necessary first to proceed under Rule 415(3) of the Supreme Court Rules. The latter application is specifically to be brought against the trustee or administrator: and that under Section 35 prescribes in terms that the respondent shall be the Bondsman.

Pleadings prescribed in the Province of Ontario for such an action are set out in Digest of Ontario Case Law (Butterworth's) Volume 1, commencing at page 849 to 865.

Application by personal representative for Order directing a secured creditor to value his security or be barred from recovery.

Section 42(6) Where a creditor or other person files with the legal representative of an estate a claim that is wholly or partly secured but fails to value the security,

(a) a judge may, on summary application by the legal representative or any other person interested in the estate, (of which three days' notice shall be given to the claimant) order that unless a statutory declaration is filed with the legal representative within the time limited by the order, the claimant will be wholly barred of any right against the estate in respect of the claim or the part thereof that is secured, and

(b) if the order is not complied with, that claimant is wholly barred of any right against the estate in respect of the claim or the part thereof that is secured.

[1969, c. 2, s. 42]

Jurisdiction is specifically given to 'a judge', which means a judge of the Surrogate Court or the Court of Queen's Bench.

The Applicant may be 'any person interested'. The proceeding is stated to be by 'summary application' which would bring us within the purview of Part 30 of the Supreme Court Rules: but there would seem to be no reason for using Part 30, for the identity of the Respondent would never be in question.

By Rule 413(c) of the Supreme Court Rules, the applicant may proceed by originating notice for the determination of

> any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person ..

The Statute provides for 3 days' notice to the respondent. The Rules would, of course, require a full 10 days.

On the authority of Sanders v Nousek (supra, Sched II page 2) if authority it be, it would appear that the wording of the Notice should, as closely as possible, follow the wording of the Act.
No cases.

[Administration of Estates Act, R.S.A. 1970, c.1]

Application by a claimant for an Order allowing his claim [against an estate] and determining the amount of it.

Section 43. (1) Where a claim is made against the estate of a deceased person or where the legal representative of an estate has notice of a claim, he may serve the claimant with a notice in writing referring to this section and stating that he contests the claim in whole or in part and, if in part, stating what part.

(2) Within 60 days after the receipt of a notice of contestation under subsection (1) or within three months thereafter if the judge on application on motion so allows, the claimant may, upon filing with the clerk a statement of his claim verified by affidavit and a copy of the notice of contestation, apply to a judge on motion for an order allowing his claim and determining the amount of it and the judge, after hearing the parties and their witnesses, shall make such order upon the application as he considers just. (*)

(3) Not less than 10 days' notice of the application shall be given to the legal representative.

(*) It was held in Theatre Network $1.49 Society v Public Trustee for Alberta (1977) 5 Alta L.R. (2d) 104; 13 A.R. 268, that the applicant had 60 days plus 3 months in the judge's discretion to file his claim: that the application for extension, therefore, could be made after the expiration of the 60 days. The decision is in the District Court.

This application, like the immediately preceding one, is stated to be 'by summary application': this time on 10 clear days' notice and Rule 413 of the Supreme Court Rules would appear equally to apply to authorize the bringing of the application by Originating Notice.

The wording of subsection (2), however, specifically provides for viva voce evidence and this provision would appear to call for an application as provided in Part 30 whereby the judge could set a time and give directions for the proof of the claim.

Unfortunately, other than the Theatre Network case quoted supra, there are no reported decisions upon the procedure.

[Administration of Estates Act, R.S.A. 1970, Ch.1)

Application for opinion, advice or directions respecting the estate of a deceased person.

> Section 67 (1) Any legal representative of an estate may apply by originating notice of motion for the opinion, advice or direction of a judge of the Court of Queen's Bench or a surrogate court on any question respecting the management or administration of the estate.
>
> [the Statute proceeds to provide that, acting on the advice, except where there is fraud, the legal representative is deemed to have properly exercised his duty]

The text of the Statute derives from the Trustee Act, R.S.A. 1955, Chapter 346 which used to read

> 50. (1) Any trustee, guardian, executor, or administrator may without the institution of an action apply in court or in chambers in the manner prescribed by rules of court for the opinion, advice or direction of a judge of the Supreme Court or a district court on any question respecting the management or administration of the trust property or the assets of the testator or intestate.
>
> [there were similar provisions to those adverted to above regarding the trustee being deemed properly to have exercised discretion]

Jurisdiction certainly extended, in the former Statute, to a Judge in Chambers.

The form of application is stated to be by Originating Notice of Motion and here again it would appear that Part 30 is to be preferred since the Respondent is not necessarily self-evident and the judge may wish to direct notice to creditors, for example, or may be disposed to dispense with notice.

The cases: In Re: George Estate, Public Trustee (George Estate) v Governors of the University of Alberta (1959-60) 30 W.W.R. 462, application was made by the Administrator of the estate, first, for a declaratory Order to the effect that X and Y were 'one and the same person' and, secondly, for an Order directing distribution to the Ultimate Heir. Judge Emmanson, adverting to Re: Barton Estate [1950] 1 W.W.R. 46, refused to grant either order: the declaratory Order upon the ground that the applicant ought to have followed the procedure in Re: Barton and requested direction as to the inquiry to be made for the next-of-kin and quoting the text from Re: Barton of the advertisement. Secondly, and more important, His Honour refused to grant the Order for payment out to the beneficiary upon the ground that distribution to the heirs, after suitable inquiry, is a routine matter and a court should not be asked to relieve an administrator of a routine duty.

The section of the *Trustee Act* under which the application was made was the one cited *supra* and the Rule of the Court was 466(g) which then read

> 466. The executors or administrators ... may serve an originating notice returnable before a judge for such relief of the kind and nature following ...
>
> (g) the opinion, advice or direction of a judge pursuant to the Trustee Act.

This Rule is now Rule 410(f) and it makes no reference to the Administration of Estates Act:

> 410. Proceedings may be commenced by originating notice in the following cases:
>
> (f) proceedings for the opinion, advice or direction of the court pursuant to the *Trustee Act*

At page 465 of the Judgment, His Honour goes on to state

> Likewise, the court will not on a motion by an executor for advice decide whether certain property is or is not part of an estate. ...
>
> The judgment of Middleton, J. in Re Fulford (1913) 29 O.L.R. 375; 14 D.L.R. 844, in my opinion, furnished in outline the kind of applications which can properly be made under section 50 of *The Trustee Act* [or under the *Administration of Estates Act*, *supra*]. In that case, the court was asked to approve a scheme of investment of estate funds, which it refused to do. At p. 850, Middleton, J., made the following observations:
>
> > "The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the court. The executors cannot come to the court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. *The advice which the court is authorized to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.*" (my italics)

The Court did, however, consent to give directions as to the notice which the legal representative should publish advertising for next-of-kin of the deceased and quoted in full the text of the advertisement derived from that prescribed in the Barton Estate case [1950] 1 W.W.R. 46.

AGROLOGISTS ACT, R.S.A. 1970, c. 10

Appeal from expulsion from the Institute.

Section 28. (1) A person suspended or expelled from the Institute may at any time within three months after the date of the Order of the Council appeal to the Court of Queen's Bench of Alberta against the Order.

(2) The judge hearing the appeal, after due notice to all parties concerned, shall allow or dismiss the appeal or make an order varying the order of the council and may make such order as to costs as he considers just.

(3) The appeal shall be founded upon a copy of the evidence and the record of the proceedings before the council and the order of the council certified by the registrar who shall furnish a copy of the same to the appellant upon request.

(4) There is no appeal from the decision of the Court.

Nothing in the Statute indicates the manner in which the applicant signifies his intention to appeal.

There are no cases reported upon the section.

The act does not say that the appeal shall be 'upon the merits' and therefore the Dudley case (1977) 2 Alta L.R. (2d) 384, probably does not apply.

Inquiry from the council yielded the information that no appeal has ever been launched and that since membership in the Institute is voluntary and any person may practice the profession whether or not he calls himself an 'agrologist'. There is therefore no likelihood of the section being used. The expulsion would be of no effect and the person suspended would only have to cease describing himself as an 'agrologist'.

ALIMONY ORDERS ENFORCEMENT ACT, R.S.A. 1970, c. 17

Summons requiring the respondent to appear and show cause why he should not be committed to prison upon the grounds that his failure to comply with an Alimony Order was wilful.

Section 3. (1) Where a person against whom an order has been made for the payment of any money under the Maintenance Order Act, the Reciprocal Enforcement of Maintenance Orders Act or Part 2 of the Maintenance and Recovery Act, or for alimony, has not paid any or all of the sums payable under the order, the person to whom such sums are payable may procure a summons in Form A in the Schedule from the clerk of the court

(2) The Summons shall require the defendant to appear before a judge in chambers at a time and place within the judicial district therein named, for the purpose of

(a) being examined under oath ...

(b) showing cause why he should not be committed to prison on the grounds that his failure to comply was wilful

(3) The Summons shall be served upon the defendant in such manner as a judge may direct, and in default of a direction shall be served upon the defendant personally.

[R.S.A. 1955, c.12, s.3; 1961, c.2, s.3; 1978, c.51, s. 38(3)(b)]

Jurisdiction - It is interesting to note that the jurisdiction of a judge in chambers is specifically provided for in this Statute.

Section 2 (c) "judge" (i) means a judge of the Court of Queen's Bench and (ii) includes a judge in chambers (my italics).

The Originating Document is prescribed by the Act and provision is made for the Clerk of the Court to disseminate the forms required. By the Act the Applicant is the beneficiary of the Order and the Respondent, the judgment debtor; service is personal unless otherwise ordered. No time for service is prescribed and on literal reading of the Statute no affidavit by the payee is necessary.

An out-of-province Order may be enforced by leave of a judge, pursuant to the provisions of Sections 15 and 16.
In this connection see Martin (Martin Estate) v Martin (1960) 31 W.W.R. 643 - By 15(1) only a person resident in Alberta to whom or for whose benefit a sum is payable may cause a foreign order to be filed. The filing of a foreign order by some other person is a nullity.

Although the proceedings are commenced by Summons, where, upon the returnable date it is the intention of the defendant (respondent) to apply to have the amount payable under the Order reduced, he should file a notice of motion. Shervey v Shervey (1963-4) 45 W.W.R. 638 (Alberta Supreme Court). In the judgment, Primrose, J., said in part

> ".. the Act makes provision for variation of an order for payment (section 12); the Court may rescind or alter an order for payment previously made against the defendant. If the judge is to be asked to alter the order by reducing the amount, counsel should file notice of motion setting out that they want some variation in the order. Then everybody would be warned and proper consideration could be given to it in advance by both parties; i.e., there would be two clear issues: (a) a committal for default and (b) a reduction in the monthly amount payable.

In an application for the enforcement of arrears, Zilka v Zilka (1978) 5 Alta L.R. (2d) (Alberta Appellate Division), the judgment of Sinclair, J.A., includes the following dicta (at page 365 of the judgment)

> "Before leaving the subject of arrears I should mention that we were referred by counsel for the husband to cases such as McMillan v McMillan, [1949] 1 W.W.R. 769; 2 D.L.R. 762 (Sask. C.A.) in support of a rule that unless special circumstances are shown, the courts will not enforce payment of alimony or maintenance that is in arrears for more than one year. ... It is unnecessary to consider either the historical purposes or the contemporary relevance of this rule.

Sinclair, J., then, does not admit the universality of the rule. For the record, however, the McMillan case at the report in the D.L.R. [1949] 2 D.L.R. 762 at page 766 the Court refers to cases in the English Court of Appeals, among them Kerr v Kerr (1897) 66 L.J.Q.B. 838 at 840 where Vaughan Williams J. said in part

> ... it is a standing rule that the Court will not in the absence of special circumstances make an order enforcing more than one year's arrears.

The judgment goes on to discuss the unquestioned power of the Court to vary payments.

The "one-year rule", then, can not be said to be a rule at all.

THE ARBITRATION ACT, R.S.A. 1970, c. 21

"Court" means the Court of Queen's Bench of Alberta (s. 2(b))
"judge" means a judge of the Court of Queen's Bench of Alberta (s. 2(c)) and there is no specific mention of a judge in chambers.

Application for leave to revoke a submission. (Submission is an agreement to arbitrate)

Section 3. A submission, unless a contrary intention is expressed therein,
(a) is irrevocable except by leave of the Court or a judge and has the same effect as if it had been made an order of the Court and
(b) shall be deemed to include the provisions set out in Sched A...

There are no legislative provisions covering the originating document, the parties, Notice, evidence or rules of law or presumptions.

In Mobil Oil Can Ltd v Pan West Engineering & Construction Ltd [1973] 1 W.W.R. 412, Lieberman, J., declined to revoke the submission and gave effect to the arbitration clause.

See also Sumitomo Shoji Can Ltd v Graham [1973] 3 W.W.R. 122 and Karlsen Shipping Co Ltd v Sefel J & Associates Ltd [1977] 3 W.W.R. 123; 2 Alta L.R. (2d) 170

Application was also made in the Mobil Oil case (supra) for interpretation of the arbitration clause, which brought the proceedings within the purview of Rule 410(e) of the Rules of Court.

It was held in Alberta Power v McIntyre Porcupine [1975] 5 W.W.R. 632 that where the agreement provides that the parties shall have the option of bringing an action in the courts there is no repugnancy in the two alternatives and the two remedies may exist side by side.

Application for an Order appointing arbitrator.

Section 5. (1) A party to a submission may serve on the other party or parties or on the arbitrators, as the case may be, a notice in writing requiring him or them to appoint an arbitrator, umpire or third arbitrator, [when the agreement provides for appointment: and when in default of his/their obligation to appoint such arbitrator he/they fail so to do]

(2) If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may on application by the party who gave the notice appoint an arbitrator,

[Arbitration Act, R.S.A. 1970, c. 21]

umpire or third arbitrator, as the case may be, who has the same powers to act in the reference and make an award as if he had been appointed by consent of all parties.

[R.S.A. 1955, c.15, s.5]

The form of application is not prescribed. By implication the material in support is

- proof of service of Notice 7 clear days before the bringing of the application;
- allegation of non-appointment of arbitrator or umpire by the respondent;
- suggested name of arbitrator or umpire to be appointed by the Court.

There are no cases reported.

Application for an Order to set aside the appointment of an Arbitrator appointed under Section 6(1)

(Section 6 (1) Where a submission provides that the reference will be to two arbitrators, one to be appointed by each party, then unless the submission expresses a contrary intention,
(a) if either of the appointed arbitrators refuses to act or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place, or
(b) if on such a reference one party fails to appoint an arbitrator either originally or by way of substitution for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment,
(i) the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and
(ii) the award of that arbitrator is as binding on both parties as if he had been appointed by consent.)

Section 6(2) The Court or a judge may set aside an appointment made under this section.

The form of application is not prescribed. By implication the material in support should consist of an affidavit bringing the applicant within the Rule, explaining why the appointment was not made and the reason for the application for setting aside.

There are no cases reported.

[Arbitration Act, R.S.A. 1970 c. 21]

Application for an Order enlarging the time for making an award.

Section 9. Whether or not the time for making an award has expired such time may be enlarged by order of the Court or a judge. [R.S.A. 1955 c.15 s.9]

No prescribed procedure; no cases.

Application for an Order
(a) removing an Arbitrator for misconduct and/or
(b) setting aside an award for the misconduct of the arbitrator or the improper procuring of an award.

Section 11. (1) When an arbitrator or umpire has misconducted himself, the Court or a judge may remove him.

(2) Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court may set the award aside. [R.S.A. 1955, c.15 s.11]

No prescribed procedure.
Slavutych v Baker [1975] 4 W.W.R. 620 held that the improper consideration of evidence sufficed to justify setting aside an arbitration. Confidential documents submitted for a limited purpose were considered in an arbitration involving a party submitting such documents. The Supreme Court of Canada set the arbitration aside.

Application to enforce an [arbitration] award as a judgment.

Section 12. An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect. [R.S.A. 1955, c.15, s.12]

No prescribed procedure; no cases.

Application for an Order in the nature of a Habeas Corpus Testificandum for a prisoner so that he may testify in arbitration proceedings.

Section 13. The Court or a judge may make an order in the nature of a writ of habeas corpus ad testificandum to bring up a prisoner for examination before an official, special referee, arbitrator or umpire.

The Statute does not prescribe any procedure but see Crown Practice Rules in Civil Matters: Rule 738, which provides for Notice of Motion and 2 clear days. No provision is made for notice to the

Solicitor-General which would certainly be required.

No cases are reported.

Reference upon a question of law.

Section 14. A referee, arbitrator or umpire at any stage of the proceedings under a reference may, and if so directed by the Court or a judge shall, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. [R.S.A. 1955, c. 15, s.14]

No form is prescribed; no details regarding service or notice to the opposing party. The whole is at the discretion of the Court.

There is not an absolute right to such an Order. A party to a submission is not, as a matter of right, entitled to a reference whenever a question of law arises in the course of an arbitration. See the judgment of Meredith, C.J.O. in Rathburn Co v Standard Chemical Co (1903) 5 O.L.R. 286 at 297 quoted with approval by Steer, J. in Alberta & Southern Gas Co Ltd v Chevron Ltd. (1956) 59 D.L.R. (3d) 140

> "The fact that an arbitrator is specially qualified to decide the question of law is a circumstance which, taken in connection with other circumstances, may affect the exercise of the discretion"

See also regarding arbitration awards Re Zwirner and Board of Governors of the University of Calgary (1978) 79 D.L.R. (3d) 81 in the Appellate Division of the Alberta Supreme Court. (Also reported at 6 A.R. 271 and (1977) 4 Alta L.R. (2d) 31.)

ASSIGNMENT OF BOOK DEBTS ACT, R.S.A. 1970 c. 25

Note - An Assignment of Book Debts: the essentials thereof, are discussed in detail in the two judgments in Bank of Nova Scotia v Diversified ... [1975] 2 W.W.R. 344 (T.D.) reversed in part in the judgment of the Appellate Division reported at [1975] 5 W.W.R. 610. It was held that the balance due the Assignor in a bank account at the date of the Assignment fell within the definition of a Book Debt. Sufficiency of Notice was also discussed.

Application for an Order permitting registration notwithstanding defective proof of execution.

[Assignment of Book Debts Act, R.S.A. 1970 c. 25]

Section 10. (1) Where the attesting witness to a document to which this Act applies dies or leaves the province before making the Affidavit of Execution required by this Act or becomes incapable of making or refuses to make the affidavit, a judge of the Court of Queen's Bench, upon being satisfied as to the execution and attestation of the document may make an order permitting the registration of the document. [S.A.1953 c.6, s.13]

[the above amendment as to the court has been arbitrarily added although as at the 1978 S.A's it was not included]

There is no provision in the Statute for any notice to any person and presumably the application may be brought ex parte. No cases are reported. There is no provision for filing the material upon which the application is based and the Order is filed with the document of Assignment.

Application for an order permitting rectification of omission or misstatement from an Assignment of Book Debts

Section 12. (2) Subject to the rights of other persons accrued by reason of any omission or misstatement referred to in this subsection, a judge of the Court of Queen's Bench, on being satisfied that any omission or misstatement in any document filed under this Act was accidental or due to any other sufficient cause, may in his discretion order the omission or misstatement to be rectified, on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter or thing as the judge sees fit to direct.
[1958, c. 6, s. 15; 1966, c. 12, s. 24; 1976 c. 58 s. 1(3); 1978, c. 51 s. 37]

The comments made supra regarding applications under s.10 apply. This application, however, would appear to fall clearly within Part 30.

BILLS OF SALE ACT, R.S.A. 1970, c. 29, as amended S.A. 1973

Application for an Order permitting registration notwithstanding defective proof of execution.

Section 18. (1) Where, before the making of any affidavit of execution required by this Act, the attesting witness to a bill of sale or other document dies or leaves the Province, or becomes incapable of making or refuses to make the affidavit, a judge of the Court of Queen's Bench may make an order permitting the registration of the bill of sale or other document upon such proof of its due execution and attestation as the judge by the order may require and allow.

[R.S.A. 1955, c. 23, s. 22, S.A. 1978 c. 51 s. 35]

No legislative provisions exist for notice and presumably the application may be brought ex parte; the Order is discretionary. No cases are reported. There is no provision for filing the material upon which the application is based but the Order is filed with the Bill of Sale or other document.

Application for rectification of omission or misstatement in a Bill of Sale.

Section 24. (2) Subject to the rights of other persons accrued by reason of any omission or misstatement referred to in this subsection, a judge of the Court of Queen's Bench, on being satisfied that any omission or misstatement in any document filed under this Act was accidental or due to any other sufficient cause, may in his discretion order the omission or misstatement to be rectified, on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter or thing as the judge sees fit to direct.

[S.A. 1973 c. 13 s. 1(3); 1978 c. 51 s. 35]

The comments made supra regarding applications under s. 18 apply. This application, however, would appear to fall clearly within Part 30.

BUILDERS' LIEN ACT, R.S.A. 1970 c. 35

Owner defined; Act, s. 2(g) "a person having an estate or interest in land at whose request, express or implied, and (i) upon whose credit, or (ii) upon whose behalf, or (iii) with whose privity and consent, or (iv) for whose direct benefit, work is done or material is furnished for an improvement to the land and includes all persons claiming under him whose rights are acquired after the commencement of the work or the furnishing of the material.

Cases:

Where work is done for a tenant or for some person other than the owner, Section 12(1) prescribes the means of giving notice to the owner, so as to make the lien attach to the freehold.

The Notice must disclose the full amount of the lien claimed, otherwise the lienholder will be restricted to the lesser amount shown in the Notice.
The text of the Notice was also discussed and prescribed.
Neumann v Howe et al. Royal Bank of Canada v Neumann et al. Revelstoke Building Materials Limited v Howe et al [1973] 1 W.W.R. 249, Alberta Appellate Division, confirming [1972] 2 W.W.R. 395. See particularly the Trial Division judgment.

"Owner" does not include the members of a Co-operative which ordered work done on a right-of-way which traversed its members' land. The Co-Operative itself is the owner and a lien will attach to the right-of-way but the fee simple of the members is not liable to be attached in a claim for lien for a gas pipeline constructed upon that right-of-way.
East Central Gas Co-Op Ltd et al v Henuset Ranches and Construction Ltd. (1977) 6 A.R. 347

The Crown's interest in land is not attachable under the Act but only the Crown may claim the immunity and where the immunity was claimed by the general contractor for C.M.H.C. and not by C.M.H.C. itself, the application was dismissed.
Engineered Homes Limited v Popil (Alberta District Court) [1972] 4 W.W.R. 357.

A company incorporated by members of an Indian band is not an Indian and therefore the interest of such company is lienable; such interest does not constitute 'Indian lands' for the purposes of the Indian Act or the B.N.A. Act (see paragraph 66 of the judgment)
Western Industrial Contractors Ltd v Sarcee Developments Ltd (1979) 15 A.R. 309 (Alberta Appellate Division)

continued - - -

[Builders' Lien Act, R.S.A. 1970, c. 35]

Lien Fund defined

Act, s. 15(1) In this section and in section 18, the expression "the lien fund' means the percentage retained by the owner as required by this section, plus any amount payable under the contract which has not been paid by the owner under the contract in good faith prior to the registration of a lien, less any amount permitted by section 16 to be paid.

The Lien Fund is defined in section 15 as the total of two separate amounts:
(a) 15 per cent of the value of the contract price minus the cost of the work which remains to be done and
(b) any amount payable under the contract which has not been paid by the owner.
Schlumberger (Canada) Ltd v Superior Contracting General and Mechanical Ltd (1977) 4 Alta L.R. (2d) 191

Computation of the Lien Fund, see also
Kronsage v Pool et al and Fibre Fab Industries Ltd (Alberta Dist. Court) (1978) 5 Alta L.R. (2d) 333

The Court considered in Revelstoke Building Materials Limited v Howe et al [1973] 1 W.W.R. 249, (at 253) whether payments made by a mortgagee to a contractor effected a pro tanto discharge of a materialman's lien prior to notice of the lien served upon the mortgagee. It was held ... "a mortgagee ... is entitled to advance mortgage moneys to a contractor if it does so in good faith and in the absence of notice of lien, up to the amount of the imperative statutory retention, and such advances will effect a pro tanto discharge of liens". (per Clement, J.A.)

Payment into Court pursuant to s. 35 of the Builders' Lien Act (see infra, page does not preclude the applicant from challenging the validity of the lien. Peddlar People Ltd. v MacMahon Plastering Co. Ltd. (1960) 33 W.W.R. 47, per Riley, J. in the Alberta Supreme Court but in this connection, it is at all times the duty of the respondent (owner) to keep in issue the amount of the lien, if the same be in question. In Nelson Lumber Co. Ltd v Integrated Building Corporation Ltd et al (No. 2) [1976] 2 W.W.R. 538 (Alberta Appellate Division) the Court declined to reopen the case, for the purpose of deciding the proper amount of the lien. The issue throughout the controversy had been whether or not the lien was filed in time and the Supreme Court of Canada, on holding that the lien was properly filed, also directed the owner to pay the full amount of the lien fund to the Lienholder. The issue as to the amount was not argued and for failing to press the issue of quantum during a series of hearings on the other point, that of time of filing, the defendant lost its opportunity to challenge the amount claimed; in the result judgment was given for the full sum.

On a large project involving more than one contract, can it be said that there is only one lien fund available for all liens filed in respect of the project? The point was decided by the Appellate Division in Yale Development Corp'n Ltd v A.L.H. Construction [1973] 2 W.W.R. 477; 32 D.L.R. (3d) 301; affirming [1972] 1 W.W.R. 725; 22 D.L.R. (3d) 597. The owner entered into six different contracts in respect of different jobs on a large project. It was held that there were six separate and distinct lien funds: one for each contract.

The summary procedure which is commenced by Statement of Claim is dealt with elsewhere in this work at page

The principal Applications authorized by the Statute are as follows:

Application for an Order directing the respondent to allow a lienholder to inspect contracts, agreements, mortgages, agreements for sale or statements.

> Section 24 [Right to information granted by the Act to a lienholder and enforced by the Court]
>
> (5) The court may on summary application at any time before or after proceedings are commenced for the enforcement of the lien make an order requiring
> (a) the owner or his agent or
> (b) the contractor, or
> (c) a sub-contractor, or
> (d) the mortgagee or his agent, or
> (e) the unpaid vendor or his agent
> as the case may be, to produce and allow a lienholder to inspect any contract or agreement or mortgage or agreement for sale or statement of the amount advanced or statement of the amount due and owing, upon such terms as to costs as the court considers just. [1970, c. 14, s. 24]

The statute fails to indicate whether the right to apply for the Order above described is dependent upon the applicant's first making the demand described in Section 24, subsections (1) to (4) inclusive, and being refused.

There are no cases reported on the application. Part 30 would seem to be indicated.

[Builders' Lien Act, R.S.A. 1970, c. 35]

Two distinct applications by originating notice of motion, apart from the interlocutory applications authorized by the summary procedure, are permitted to the owner or to some person desiring to clear the lien. They are

(a) Application to fix the amount of the Lien Fund, pursuant to Subsection 18(5)(b) and, pursuant to Subsection 18(2)(b) to pay into Court the amount of the Lien Fund; and

(b) Application pursuant to Section 35, for cancellation of a lien upon the giving of security or upon any proper ground.

The principal difference between the two applications would seem to be that under 18(2)(b) there is provision for notice in accordance with the provisions of Section 37(1) (upon "all persons who, by the records of the Land Titles Office, appear to have an interest ..." and such other persons as the Court may direct. An application under Section 35 does not in terms require notice to be served in accordance with Section 37(1) and semble the originating notice, then, need only be directed to the claimant whose lien is in question.

There is no case dealing with the point.

Application to fix the amount of the Lien Fund, pursuant to ss 18(5)(b) and to pay into Court the amount of the Lien Fund under 18(2)(b)

Section 18(2) Where a statement of lien has been registered, the owner or a mortgagee authorized by the owner to disburse the moneys secured by a mortgage may, ...
(b) on application by originating notice of motion pay into court the amount of the lien fund.
(3) On an application under subsection (2), notice shall be given as provided in section 37(1)
[the statute provides that payment into court results in removal of the liens from the land]
(5) On an application under subsection (2) the court
(a) may hear and receive such evidence, by affidavit or viva voce or otherwise, as it considers necessary in order to determine the proper amount of the lien fund to be paid into court,
(b) may direct the trial of an issue to determine the amount of the lien fund to be paid into court, and
(c) may refuse the application if it is of the opinion that the determination of the amount of the lien fund should be made at the trial of the action.

Semble 18(5)(c) would only obtain where the application had been brought by way of interlocutory application: but the statute does not in terms set this out and there are not, as far as I am aware, any cases upon the point. The Court in any case has the option to direct an issue and would probably do so where the lienholder had not, at the date of the application, commenced an action.

Section 35 (1) The Court may, upon application by originating notice
(a) order that the registration of a lien be cancelled upon the giving of security for or the payment into court of the amount of the claim and such costs as the court may fix, or
(b) order that the registration of a lien be cancelled on any proper ground.

Justice McDermid of the Appellate Division in Driden Industries v Sieber et al [1974] 3 W.W.R. 368 commented as follows (p 372)

"It would have been better if the Legislature had spelled out the procedure to be followed when moneys were paid into Court under section 35, but since it has not done so the procedure to be followed must be decided by reference to analogous provisions of the Act. Therefore, there should be a direction by the Court as to the procedure when the application to pay into Court is made.

[Semble, His Lordship is also referring, then, to applications under Section 18]

"Section 39, which provides for pre-trial application, would apply after there has been a direction as to the issue and who is to be plaintiff and who defendant. It might even if that all these matters could be settled in the same application" [sic].

Because of the obvious misprint in the report it is not possible to know exactly what His Lordship did say, but one might conjecture that he meant that where an issue was directed under Section 18 a pre-trial application would follow. It is not clear how His Lordship proposes that a pre-trial application be brought under Section 35.

In Driden Industries the money remained in court until the time for filing expired and then the owner simply asked to have the money paid out, no action having been commenced by the lien claimant.

The cases are set out in the notes supra at Sched II pages 18 to 20 and the principal action is discussed elsewhere in this paper at page

THE BULK SALES ACT, R.S.A. 1970, c. 37

Application of 'any person interested' for the appointment of a trustee to receive the proceeds of a sale in bulk, where the creditors have failed to appoint one and the vendor has failed to appoint one.

Section 13 If the creditors of the vendor in their written consent to a sale in bulk have not named a trustee and the vendor has not named one, a Judge of the Court of Queen's Bench shall, by order made upon the application of any person interested, appoint a trustee and fix the security, if any, to be given by him. [R.S.A. 1955, c. 33, s.13; 1978, c. 51, s. 38(5)]

The application is 'by any person interested' who would probably be the assignee of a creditor; there are no cases and no direction in the statute as to the application, which would bring it within the purview of Part 30. The direction to the Judge is mandatory. The judge shall make the order.

THE CEMETERIES ACT, R.S.A. 1970 c. 39

Application by 'owner' or operator of a cemetery, columbarium or mausoleum (mandatory under the Act) to pass accounts before a Judge of the Court of Queen's Bench.

Sections 43 and 59(1) of the Act.

The Act specifically provides
- (a) the passing of accounts shall be analogous to the passing of accounts by an executor or trustee
- (b) shall take place at least once in five years and
- (c) no person other than the authorized trustee and the securities commission is entitled to Notice of the Application, unless a judge otherwise directs.

There are no cases on the section. Section 43(7) would indicate that the form set out in the Surrogate Court Rules (Form 31) and the Schedule thereto are required, with suitable amendments. Since the Act is of limited application it would not appear that an alternative to Form 31 (which scarcely applies) has been provided.

THE CHANGE OF NAME ACT, 1973, S.A. 1973 c. 63

Application for an Order authorizing a change of name notwithstanding the failure of consent to the change by some person whose consent is otherwise required by the Act.

[The Change of Name Act, 1973, S. A. 1973, c. 63]

Section 11. (1) Where, on an application to change a surname, this Act requieres that application also be made to change the surname of some other person then, if

(a) this Act requires the consent of the other person to the change of the other person's surname, and

(b) the applicant is unable to obtain the consent of the other person,

the Court of Queen's Bench may authorize the application to be made with that other person's name excluded therefrom, in which case that person's consent is not required and his surname is not changed.

...

(3) Where on an application to change a given name or the surname of a child the consent thereto of some other person is required under section 5, 6, 7, 8 or 9 and the applicant is unable to obtain the consent of the other person, the Supreme Court, having regard to the best interests of the child, may dispense with the consent of the other person to the change of name.

By Section 26 of the Act, an application to the Court of Queen's Bench under this Act shall be by Petition on such notice as the Court may require.

There is no provision for applications in Chambers, and *semble* on a literal reading of the Statute, even the following application would have to be brought in this way: i. e., the application to dispense with publication.

Section 13 [requires publication of application for a change of surname in the Alberta Gazette within two months of the application]

(3) The Court of Queen's Bench may dispense with the necessity of publishing notice of the application as required by subsection (1), if, in its opinion

(a) the applicant would be unduly prejudiced or embarrassed by the publication, or

(b) the change of surname applied for is of a minor character or

(c) the applicant has been commonly known under the surname applied for.

As mentioned *supra*, the Act prescribes a Petition for the application.

Application for an Order directing the Director 'or other person' to alter records, certificates or other documents in conformity with the

[The Change of Name Act, 1973, c. 63]

change of name.

Section 21. Where .. [in attempting to have his name changed upon his records] a question arises concerning the existence of or compliance with any or all of the facts or matters therein required or contained, on the application of the person seeking substitution of his new name instead of his former name, the Court of Queen's Bench may make an order

(a) declaring that he has complied with all the requirements of that section (s. 19 or s. 20), and

(b) directing the Director or other person to alter his records, certificates or other documents in conformity therewith.

There are no cases on the section.
Application is by Petition (Section 26) upon such notice as the Court may require.

THE CHARTERED ACCOUNTANTS ACT, S.A. 1971 c. 13

Appeal from a finding by the Council of Conduct Unbecoming a C.A., and/or from punishment imposed.

Section 44 (1) Where a member has been found guilty of conduct unbecoming a chartered accountant, the member may appeal to the Court of Appeal from the finding of guilt or the order of punishment or both.

(2) An appeal shall be commenced

(a) by filing a notice of appeal with the Registrar of the Court in Edmonton or Calgary and

(b) by serving a copy of the notice of appeal upon the secretary [of the Council]

both within 30 days from the date on which the finding and the order of punishment, if any, is made by the Council.

(3) The president or a person acting for him, may extend the time for filing or service under subsection (2).

(4) The member may, after commencing the appeal and upon notice to the secretary, apply to any judge of the Court of Queen's Bench for an order staying the imposition of any punishment imposed by the Council but the order shall be refused if the judge is satisfied that having regard to the nature of the offence it is proper to refuse it.

Section 45. (1) The Court upon hearing the appeal may

(a) make any other finding that in its opinion ought to have been made, or

(b) quash or confirm the finding of guilt, or
(c) confirm or vary the punishment imposed or order a different punishment, or
(d) confirm or vary any order of the Council as to costs or make a new order as to costs, or
(e) refer the matter to the Council for further consideration by it.

(2) The Court shall make no award as to costs of the appeal.

The Court has no jurisdiction to extend the time for filing: that right is in the hands of the president of the Council.
There are no cases reported.

THE CHARTERED PHYSIOTHERAPISTS ACT, R.S.A. 1970, c. 43

Appeal from suspension or expulsion from the Association by the council.

Section 17. (1) Any member who has been expelled or suspended from the Association may appeal from the order of the council to the Court of Queen's Bench at any time within 14 days of the date of the order of expulsion [-----------]* or within any additional time as a judge of the Court of Queen's Bench may allow.

(2) On the request of the appellant, a copy of the evidence taken at the hearing before the council shall be filed with the clerk of the court for the judicial district in which the appellant resides.

(3) The judge on the appeal may make such order or give such direction as to the expulsion or suspension and as to the costs of the appeal as to him seems just.
[R.S.A. 1955, c. 233, s. 20; S.A. 1978, c. 51, s. 38(7)]

[*] the words "or suspension" are deleted from the 1978 amendment to the section.

The Court has jurisdiction to extend the time for filing, unlike the jurisdiction granted in the Chartered Accountants Act.
No form is prescribed for the launching of the appeal.

THE CHILD WELFARE ACT, R.S.A. 1970 c. 45

Application for the adoption of a child.

Section 50(1) An application to adopt a child shall be made by petition, which shall first be submitted to the Director.

(2) In the interests of the chiod, the Director shall cause an investigation to be made of each application to adopt a child and prepare

[The Child Welfare Act, R.S.A. 1970, c. 45]

a report of the investigation.

(3) An order of adoption shall not be made unless a petition together with a report of the investigation is presented to the judge by the Director. [1966, c. 13, s. 48]

Material in support of the Petition:

Section 51. (1) A petition shall be supported by affidavit disclosing:

(a) the name, date of birth, place of birth, sex and parentage of the child to be adopted, so far as is known, and

(b) the age, address, marital status and occupation of each petitioner and the relationship, if any, of the petitioner to the child.

(2) The petition shall, in respect of the fitness of each petitioner to adopt the child, be further supported by an affidavit or affidavits of persons acceptable to the Director, or by such other material as the Director may require.

(3) If an agreement or arrangement exists whereby consideration is passing to or from a petitioner, the terms of the agreement shall be disclosed in the petition and any document or writing relating thereto shall be made an exhibit to the affidavit of the petitioner. [1966, c. 13, s. 49;
[1970, c. 17, s. 12]

Procedure is prescribed: the Director presents the petition to the Judge and unless the judge otherwise directs, the proceedings are to be in camera (S. 53).

The petitioner may be heard (s. 53(2)) but the material in support of the application is (Section 51(2)) any which is acceptable to the Director: not to the Court.

Application to vary sums ordered to be paid to the Director for the maintenance and support of a neglected child. The Statute gives leave to the payer of such sums to apply upon proof of circumstances which would justify such an order.

Section 26.1 (2) A judge may, from time to time, vary the amount to be paid under [an order under ss. 24 or 26] on the application of

(a) the Director or

(b) any person against whom the order is made

upon proof of such circumstances as in his opinion justify a varying of the terms of the order. [1971, c. 15, s. 5]

"Judge" in this part is a Judge of the Juvenile and Family Court.

There would not seem to be specifically provided any appeal from the order varying the amount to be paid though s. 27 is probably broad enough to encompass it.

[The Child Welfare Act, R.S.A. 1970 c. 45
Amended S.A. 1971 c.15 s. 5, 1977 c. 11 s. 3]

Appeal from the order of a Judge of the Juvenile and Family Court to a Judge of the Court of Queen's Bench, in respect of a Wardship Order. Semble, such appeal may also be launched in respect of an Order made under s. 26.1 supra; [26.1 dates from 1971]

Section 27. (1) Within thirty days from the making of an order under this Part by a judge of the district court [sic] or the juvenile court,

(a) a parent, guardian or other person in whose care the child may have been, or

(b) the director,

may appeal to a judge of the Court of Queen's Bench by filing with the clerk of the court of the judicial district within which the order was made a notice of appeal setting out the particulars of the order appealed from and the grounds for the appeal.

["parent" should be given its ordinary meaning and therefore includes the father of an illegitimate child
Gingell v The Queen [1976] 1 WWR 232; 55 DLR (3d) 589

(2) A copy of the notice of appeal shall be served upon the clerk of the court that made the order and

(a) upon the parent or parents of the child or the guardian or other person in whose care the child may have been, or

(b) upon the Director

as the case may be, within thirty days from the date of the making of the order or such longer time as a Judge of the Court of Queen's Bench may allow.

(3) [from S.A. 1977, c.11 s.3]

The clerk of the court that made the order appealed from shall, within seven days from the time the notice of appeal is served upon him, forward to the clerk of the court of the judicial district in which the notice of appeal is filed

(a) the order

(b) the depositions or transcript evidence taken at the hearing and

(c) all documents and exhibits filed at the hearing.

[The Statute formerly set out that the judge who made the Order was to forward the above material set out in (3), together with his reasons for making the order. This direction was dropped from the Statute in 1977]

(4) Unless a Judge of the Court of Queen's Bench otherwise directs, the appeal shall come on for hearing at the first sittings of the Court of Queen's Bench to be held, after the filing and serving of the notice of appeal, in the judicial district in which the notice of appeal is filed.

[The Child Welfare Act, R.S.A. 1970, c. 45
Amended S.A. 1971 c.15 s. 5, 1977 c. 11 s. 3]

(5) Upon the hearing, the Judge of the Court of Queen's Bench shall determine the appeal upon the material filed and such further evidence as he may require or permit to be given and may
(a) affirm the order made, or
(b) revoke the order made, or
(c) make any order that could have been made at the original hearing,
and for that purpose he has all the powers of a judge of the district court (sic) and of the juvenile court under this part.

The Court has complete discretion as to further evidence in addition to the material filed.

The appeal provided for in Section 27 constitutes, in effect, a trial de novo in that additional evidence is permitted to be adduced with leave of the Court (s. 27(5)). There is nothing that indicates that the appeal court is bound by any finding of fact or judgment as to credibility.

Judicial comment upon the Act -
The following is not very relevant and indeed completely irrelevant to the procedure: it is reproduced here because it might be useful upon almost any application:

"The Act, insofar as it relates to neglected and dependent children is one which not only trespasses to an almost shocking degree upon the liberty of the individual, both parent and child. It is furthermore an Act whereby a charge is imposed upon the municipality -- for such purpose express and unambiguous language is required." Superintendent of Child Welfare v City of Edmonton (1957) 22 WWR 593 (per Buchanan, C.J.D.C. at page 597)

Cases on the Adoption Petition (under Section 50(1))
An Order committing a child permanently to the care and custody of the Superintendent of Child Welfare as a neglected child does not suffice to make the Superintendent its absolute guardian and an adoption order cannot be made without consent of natural parents. Re: Child Welfare Act - Re F's Adoption Petition (1959) 29 WWR 454.

Where the consent of the mother has been capriciously withdrawn it should be dispensed with. Re: Child Welfare Act, Re: Adoption of David Snider (1966) 56 W.W.R. 116

Case re: dispensing with the consent of a guardian to an infant adoption on the grounds of "gross moral turpitude" see Re: Child Welfare Act, Re: Alty's Adoption; Alty v Phillips & Phillips (1961) 34 W.W.R. 1.

[The Child Welfare Act, R.S.A. 1970, c.45]
[Amended S.A. 1971 c. 15, s. 5; 1977, c.11, s.3]

For a judge to hear an adoption petition the petition must either be dated within 60 days before its presentation to the judge or it must be supported by an affidavit in which a satisfactory date of its receipt by the Child Welfare Commission within the said 60 days is sworn to. Re: Child Welfare Act: Re C's Adoption Petition (1960) 32 W.W.R. 717.

THE CHIROPRACTIC PROFESSION ACT, R.S.A. 1970, c.46

Appeal from a decision of the Council suspending or cancelling the registration of a member.

Section 8 (3) a member may appeal, by originating notice, from a decision of the council under ss (1) to a Judge of the Court of Queen's Bench at any time within thirty days of the date of the decision or within such further time as a Judge may order.

(4) The Judge on appeal may make such order or direction on the merits of the case, and on the costs, as the Judge considers just.

Stevenson, D.C.J., as he then was, in Dudley v Alberta Chiropractic Association, reported at (1977) 6 A.R. 66, discusses the procedure upon appeal in terms which it is submitted render the judgment relevant to all professional appeals. His Honour's remarks relate

1 - to the form of the document initiating the appeal and
2 - to the effect of the words "on the merits" upon the nature of the material which may be considered by the appellate tribunal.

Paraphrasing the judgment (paragraph 7 on page 67) His Honour pointed out that originating notice is an unusual procedural vehicle for an appeal: but that it ought to contain a reference to the evidence upon which the appellant seeks to rely.

The judgment goes on to hold that where an appeal is "on the merits" there is authorization for a retrial of facts. (paragraph 8, on page 68).

Appeal from refusal of the Council to register the applicant as a member.

Section 12(3)

A person who is refused registration under subsection (1) [which sets out all of the criteria for qualification] may appeal to a judge of the Court of Queen's Bench and the Judge may make such order as in the circumstance seems to him to be just.

[1966, c. 14, s. 12; 1970, c.18, s.4
[1978, c. 51, s. 35]

Nothing establishes the procedure under the section. There are no cases reported.

CITY TRANSPORTATION ACT, R.S.A. 1970 c. 47

Appeal from a decision of the Protection Area Appeal Board.

Section 18. (1) Subject to subsection (2) [leave being granted from a judge of the Court of Appeal] an appeal lies from a decision of the Protection Area Appeal Board to the Court of Appeal of Alberta.

In Edmonton no Protection Area Appeal Board has been formed to the date hereof.

No form of application is prescribed. If the matter should arise, however, one might have regard to the judgment in Macri v Council of the City of Edmonton (1977) 2 A.R. 378 which deals with the application for leave, made to a judge of the Court. It was held that in such an application the judge acts, not as persona designata, but as a judge of the Court: and that in this capacity an appeal will always lie to the full court which has an inherent jurisdiction to entertain an appeal from its members. Such jurisdiction, however, is entertained only in the case of demonstrable and decisive error occurring in the decision of the judge. (paragraphs 10 to 12 of the judgment)

COLLECTION PRACTICES ACT, S.A. 1978 c. 47

Section 16(7) [Deals with a person who has been refused a license to operate a collection agency, or has had his license suspended or cancelled; first he appeals to the Minister who appoints an appeal board (section 16) and then, if he is dissatisfied,

(7) A person whose appeal is heard by an appeal board, or the Administrator, may appeal the decision of the appeal board by filing an originating notice with the Court of Queen's Bench within 30 days of being notified in writing of the decision, and the court may make any order that an appeal board may make under subsection (4); [i.e., confirm the refusal, cancellation or suspension, order that the license or renewal be issued, reinstate the cancelled license or remove or vary the suspension].

Evidence obtained pursuant to an order of the Court of Queen's Bench under Section 20(1) is, by the provisions of Section 20(4) is admissible in evidence with the proviso only that the Administrator shall certify it to be a true copy. See also Section 24 for further provisions regarding evidence.

The form is prescribed as originating notice and presumably the remarks of Stevenson, J., in the Dudley case would apply. (1977) 6 A.R. 66.

THE COMPANIES ACT, R.S.A. 1970, c. 60

Appeal from a decision of the Registrar of Companies in respect of a name, by 'a person aggrieved', either at the refusal of the Registrar to register a company under a specified name, or his refusal to order that a name be changed.

Section 12. (1) A person who feels aggrieved by reason of

(a) the refusal of the Registrar to incorporate a company or to register an extra-provincial company pursuant to section 11, subsection (1) (3) or (4)

(b) the refusal of the Registrar to make an order under section 11 subsection (5) to change the name of a company or

(c) a notice given by the Registrar under section 11

[all of which involve the Registrar's approval, or refusal to approve of the name of a company]

.. may appeal the Registrar's refusal, notice or approval to the Court by way of originating notice of motion and upon at least seven days' notice to the Registrar and to such other persons as the court directs.

No reference in the Act to a judge in chambers.

Originating Document - originating notice of motion

Respondent - the Registrar (on 7 days' notice)
and 'such other person as the judge shall direct'.

Semble the length of time allowed such other persons will also be as the judge directs. This, on a literal reading of the section, obliges the applicant to appear once upon seven days' notice to the Registrar and then be advised by the Court whom he shall serve in addition, and what time they shall be given to enter an appearance.

The essence of the application is discussed in the reported case of Action Plumbing Ltd v Registrar of Companies, 1 Alta L.R. (2d) 296 (a judgment of the Court of Appeal, October 28th, 1976). The judgment of the majority appears at page 313.

Also of interest in the application is the decision in Bumper's the Beef House (Banff) Ltd v Registrar of Companies (1977) 4 Alta L.R. (2d) 68; 9 A.R. 349: though this decision is not as relevant to the practice aspect of the application as to the substantive questions arising.

Application for an Order confirming a resolution altering the objects of the Company.

(Note that 'special resolution' is defined in the Act at Section 2(32))

(Procedure is prescribed in Section 136)

[The Companies Act, R.S.A. 1970, c. 60]

Section 34(1) Subject to the provisions of this section, a company may, by special resolution confirmed by an Order of the Court, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it
(a) to carry on its business more economically or more efficiently,
(b) to carry on [some other business which may be combined with the business of the company]
(c) to restrict or abandon [some of its objects]

A Company may by ordinary resolution, without referring to the Court, include or exclude from its powers those matters set out in section 20(1) of the Act; but no such resolution shall be effective until a copy of the resolution shall have been filed with the Registrar and published in the Alberta Gazette.

This application must be made under Part 30 of the Rules of Court, or so recommends the Alberta Corporations Manual at page 2017, Volume A, where the procedure is discussed.

See also Alteration of a Company's Objects Clause and the Ultra Vires Rule, (1974) 90 L.Q.R. 79.

The cases are listed in the Corporations Manual at page 2017.

Application for an Order confirming a special resolution of the Company altering or reorganizing or reducing its share capital.

Section 40. (1) The Court, if satisfied with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the resolution for reducing the share capital either wholly or in part and on such terms and conditions as it thinks fit.

(2) and (3) contain administrative directions to the Company and to the Registrar.

(4) With a view to giving proper information to the public, the court may direct the company to publish the causes that led to and the reasons for the reduction, and notice of the registration with the Registrar, and such other information as the court may think expedient. (5) is administrative.

This application also falls under Part 30.

Application by a Creditor ignorant of share capital reduction, having been damaged thereby, for relief from his loss.

Section 41. (1) A member [is not liable on his share after capital reduction]

(2) Notwithstanding subsection (1) where ... any creditor ... [who was entitled to object to the reduction of capital] is by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and after the reduction the company is unable to pay the amount of his debt or claim, then

(a) every person who was a member of the company at the date of the registration of the order for reduction and minute is liable to contribute for the payment of that debt or claim an amount not exceeding the amount that he would have been liable to contribute if the company had commenced to be wound up on the day before that registration, and

(b) if the company is wound up, the court, on the application of any such creditor, and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute.

Semble the Company's subsequent winding up is a *sine qua non* to the application's being brought.

There are no cases reported on the section and no direction in the Act as to how the application is to be brought.

Application by the Securities Commission or 'by any person interested' to force compliance by a Company with legislation applicable, in the purchasing of its own shares.

Section 41.6 Where, in connection with an offer by a company to purchase shares issued by it, the company or its directors do not comply with this Act or the regulations, any member of the Commission or any interested person may apply to the court by way of originating notice and upon such application the court may make an order

(a) approving the contents of the offering circular with or without variation and requiring distribution of the corrected document to each shareholder entitled to receive it, or

(b) restraining the distribution of the offering circular or

(c) requiring any person to comply with this Act or the regulations or

(d) rescinding the offer.

Application for Order requiring repayment of purchase price where a Company, in contravention of Section 41(2) has purchased its own shares.

Section 41.21 (1) Any directors of a company who, contrary to the

[The Companies Act, R. S. A. 1970, c. 60]

provivions of section 41. 2, vote in favour of or consent to ... [the purchase by the company of its share] [must indemnify the company] [(2) provides for contribution among directors]

(3) Where a company has purchased any share in contravention of section 41. 2

(a) any creditor who was a creditor at the time of the purchase, or (b) any shareholder, or

(c) any director who is liable under subsection (1)

may apply to the court by originating notice for an order compelling the shareholder or former shareholder from whom the share was so purchased to repay to the company an amount equal to the purchase price received for that share.

(4)[provides for the court's alternative choice of remedies and

(5) provides that such action must be commenced within 2 years]

There are no reported cases and the application is of limited interest. It only obtains, of course, in circumstances limited by Section 41. 2 which says that directors of a company that is in an insolvent position shall not purchase its own shares.

Application for relief from the consequences of an inadvertent failure to comply with the Bylaws with respect to Annual Return or Minimum Membership.

Section 48(1) If the company fails to comply with the provisions that are included in its memorandum or articles and that constitute it a private company, it ceases to be entitled to the privileges and exemptions conferred on private companies under the sections of the Act relating to

[(a) special annual returns, (b) (section 197) (c) section 293)]

... (2) Notwithstanding subsection (1) the court, on being satisfied that the failure to comply with the provisions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested, and on such terms and conditions as may seem to the court just and expedient, order that the company be relieved from such consequences as aforesaid. [R.S.A. 1955, c. 53, s. 58]

There are no cases reported. No form of application is prescribed.

[The Companies Act, R.S.A. 1970, c. 60]

Application to rectify the Register of a Company.

Section 55 (1) When

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may either refuse the application, or may direct rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On an application under this section, the court may decide any question relating to the entitlement of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other, and generally may decide any question necessary or expedient to be decided for the rectification of the register.

(4) The court, when making an order for rectification of the register, shall by its order direct that notice of the rectification be given to the Registrar. [R.S.A. 1955, c. 53, s. 65]

No directions for procedure; no cases. [Cf. sections 54 and 56)

Application for extension of time for registration and/or for rectification of the Register of Mortgages.

Section 98(1) The Court, on being satisfied that the omission to register ... or omission or misstatement ... was accidental, or due to inadvertence or to some other sufficient cause, or is not of such a nature as to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration be extended without prejudice to the rights of parties acquired prior to the actual date of registration, or, as the case may be, that the omission or mis-statement be rectified.

No directions for procedure; no cases.

(See also sections 99(1) to (10) both inclusive.

[The Companies Act, R.S.A. 1970, c. 60]

Application for an Order directing a Company to permit inspection of its mortgage register.

Section 100 (1) (Every company shall keep a mortgage register)
101 (Every member, creditor or debenture-holder of the company may inspect gratis and anyone else may inspect on the payment of a sum not exceeding 25 cents, at reasonable times, the register.)

Section 101. (2) Every company that refuses any inspection required under this section is guilty of an offence and the court may order that an inspection be allowed within such time as it thinks fit.

Section 102. Any member, debenture-holder, creditor or other person may require a copy of the register of mortgages or any part thereof or of any instrument creating any mortgage registered or requiring registration under this or any former Companies Act or ordinance, on payment (prescribed) and if a copy is refused or not furnished, the company is guilty of an offence and the court may order that the copy be furnished within such time as it thinks fit.

No directions as to mode of application and no cases.

Application for an Order appointing an Auditor (the company having failed to appoint one).

Section 116 (6) Where, for any reason, no auditor is appointed, the court may, on the application of any shareholder, appoint one or more auditors to hold office until the close of the next annual meeting and fix the remuneration to be paid by the company for his or their services. [R.S.A. 1955, c. 53, s. 118; 1967 c. 9, s. 7]
No directions as to application and no cases.
Auditors' reports to shareholders described in s. 118 of the Act.
Private companies need not file auditors' reports - s. 118(1)

Application for an Order directing a general meeting

Section 133(3) On an application by the company to the court made either ex parte or on such notice to such persons as the court may direct, the court, if satisfied that in the circumstances it is in the best interests of the company to do so, may by order direct that the next annual meeting of the company be held on such date, within six months after the expiration of 16 months from the date the last annual meeting of the company was held, as the court may determine.

[The Companies Act, R.S.A. 1970, c. 60]

Section 133(6) When default has been made in holding a meeting of the company in accordance with ... this section, the court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

[R.S.A. 1955, c. 53, s. 125]

The Companies Act (ss. 133 and 134) prescribe the required meetings to be held.

Nothing in the Act says how the application for meeting shall be brought and there are no cases reported.

Application for an Order directing a meeting to be held in a manner which is contrary to the By-laws or to conduct such a meeting in a manner not in accordance with the provisions of the Act.

Section 135(2) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in the manner prescribed by the articles or this Act, the court, either on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, or of its own motion, may order a meeting of the company to be called, held and conducted in such manner as the court thinks fit, and where any such order is made, the court may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted. [R.S.A. 1955, c. 53, s. 127]

No administrative directions and no cases.

Application for an Order exempting any person compliance with the provisions of Sections 140 and 141(1) (re proxies).
(These sections provide that a public company must, along with a notice of a meeting, provide each shareholder with a proxy form and Section 141 limits the solicitation of proxies)

Section 138(2) Upon the application of any interested person, a judge of the court designated by the Chief Justice of the Trial Division may, if satisfied that, in the circumstances of a particular case there is adequate justification for so doing, make an order, on such terms and conditions as seem to the judge just and expedient, exempting, in whole or in part, any person from the requirements of section 140 or from the requirements of section 141(1).

[The Companies Act, R.S.A. 1970, c. 60]

No administrative directions and no cases.

Semble the wording of the section is such as to ensure the status of the Judge as persona designata bringing into play the provisions of the Extra-Curial Orders Act, s. 6, and the Macri case, (1977) 2 A.R. 378.

Application for an Order calling a meeting of the Creditors of a Company pursuant to a compromise arrangement entered into.

Section 154 (1) In this section "arrangement" shall be construed as extending to a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

(2) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(3) If a majority in number representing three fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company.

(4) and (5) are administrative directions for filing and distributing the Order.

Section 155(2) Where an application is made to the court under section 154 ...[and the Court becomes aware that the scheme includes a plan for amalgamation with another company or reconstruction of the company etc] the Court may by order accomplish the object of the scheme as set out in detail in the Section.

Unfortunately there are no cases under the section. This application for administrative sanction by the Court of an arrangement entered into by the directors of one or more companies and/or their shareholders would presumably be shown by the applicant to the Court to be such as to protect any claimants; it would, semble, be supported by suitable financial statements.

[The Companies Act, R.S.A. 1970, c. 60]

Application by one tenth of the issue capital for the appointment of an inspector to investigate the affairs and the management of the Company.

Section 160 (1) Upon an application by the shareholders of a company holding shares representing not less than one tenth of the issued capital of the company, or upon an application of at least one tenth of the members of a company without share capital, the court may appoint an inspector to investigate the affairs and management of the company or may appoint a person to audit its books.

(2) The application shall be supported by such evidence as the court requires for the purpose of showing that the applicants have good reason for requiring the investigation or audit, as the case may be.

(3) The court may require the applicants to give security to cover the probable cost of the investigation or audit and may make rules and prescribe the manner in which and the extent to which the investigation or audit is to be conducted.

(4) The inspector or auditor shall report thereon to the court and the expense of the investigation shall, in the discretion of the court, be defrayed by the company or by the applicants or partly by the company and partly by the applicants.

(5, 6, provide for the Company's appointing an inspector by resolution)

(7, 8, 9 provide for the powers of the auditor)

(10) A copy of the report of the inspector or auditor, as the case may be, authenticated by the court or under the seal of the company whose affairs and management he has investigated, is admissible in any legal proceedings as evidence of the opinion of the inspector or auditor in relation to any matter contained in the report.

The procedure for bringing the application is not defined. The Statute says "upon an application by the shareholders", which application shall be supported by "such evidence as the Court requires". The application should logically be brought under Part 30 of the Rules and, in fact, the Companies Manual recommends Part 30 as a vehicle.

Unfortunately there are no cases on the application but only a reference to an interlocutory application brought in Re Pe Ben Pipelines Ltd, 7 Alta L.R. (2d) 174. In that case there were several contemporary applications, one being Action 106407 in the Judicial District of Edmonton in which an Order was obtained ex parte. The report of the judgment, however, does not indicate that the result depended in any way upon the expressed opinion of an investigator or auditor, the protagonists being present and able to testify. Semble, however, where witnesses are lacking and the course of dealing can be ascertained from an examination of the company's records or extrapolated from the lack of them, the section might be an important aid to the parties in litigation.

It is noteworthy that there is nothing in the section which requires the inspector to couch his report in any particular form and nothing that requires him to report by affidavit. The statute, literally, provides that the report is evidence [only] of the opinion of the inspector and therefore it is open to the Court to give such a report very limited weight.

Application to restore a Company to the Register.

Section 189(1) Where a company ... [or some other person] is aggrieved by the company having been struck off the register, the court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the company to be restored to the register.

(2) Where an application ... is made under this section

(a) notice of the application shall be given to the Registrar;

(b) the court shall by the order fix a time within which[the order shall be filed and take effect] (bl)(publication)

(c) if the application is not made within one year from the date on which the company was struck off and another company... has been incorporated ... under the same or a similar name... the court shall by the order provide that the company be restored under another name approved by the Registrar ... but in the case of an extra-provincial company ... the court shall not make an order unless the company has changed or undertakes to change its name ...

(d) The Court [may restore the Company for a limited purpose or time]

(e) Where a company has requested the Registrar to strike it off the register, [it] shall not be restores without his written consent. [R.S.A. 1955, c. 53, s. 171; 1968, c. 13, s. 2]

The cases on the Section are

Berroy Holdings v Cowen et al (1977) 11 A.R. 22 (Dist Ct)
Pocock Floors Ltd v Holmes Const Ltd et al [1971] 1 WWR 394
both of which cases discuss the effect of the restoring Order and not the application itself.

The Statute does not prescribe the form of application but the Alberta Companies Manual provides a precedent for a Petition and the Affidavit to be filed in support of it. The Notice for the Registrar is also prescribed and the text of an Order restoring the Company to the Register. (Pp. 8102 and ff.) The Manual also gives the text of petitions for the purpose of making the Company party to an action and one for the restoration of an Extra-provincial Company.

Application for Winding-up of a Company by the Court.
See also Supreme Court Rules 754 and ff. Appeals, see s. 274.

Section 197 A company may be wound up by the court
(a) if the company has by special resolution resolved that the company be wound up by the court;
(b) if default is made in filing an annual report or in holding and annual meeting;
(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year,
(d) if the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below three, or
(e) if the court is of the opinion that it is just and equitable that the company should be wound up. [R.S.A. 1955, c. 53, s. 179]

Section 198 (1) An application to the court for the winding up of a company shall be by petition, which shall be presented, subject to the provisions of this section, either by the company, or by a contributory or contributories, or either of those parties, together or separately.

(2) Notwithstanding Subsection (1),

(a) A contributory is not entitled to present a petition for winding up a company unless

(i) either the number of members is reduced, in the case of a private company, below three, or

[The Companies Act, R.S.A. 1970, c. 60]

(ii) the shares in respect of which he is a contributory, or some of them, either were originally alloted to him, or have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding-up, or have devolved upon him through the death of a former holder,

and

(b) a petition for winding up a company on the ground of a default in diling the annual report or in holding the annual meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held.

(3) Where a company is being wound up voluntarily or is being wound up subject to the supervision of the court, a petition to have the company wound up by the court may be presented to the court by the liquidator, any creditor or any other person authorized to do so under the other provisions of this section, but the court may make the winding-up order on the petition only if it is satisfied that the voluntary winding-up or winding-up subject to the supervision of the court cannot be continued with due regard to the interests of the creditors or contributories.

[R.S.A. 1970, c. 60, s. 198; 1976, c. 61 s. 2(4)]

Section 199(1) On hearing the petition the court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground of default in filing the annual report or in holding the annual meeting, the court may, instead of directing that the company be wound up, give directions for the report to be filed or the meeting to be held, or make such other order as may be just, and may order the costs to be paid by any persons who, in the opinion of the court, are responsible for the default.

[R.S.A. 1955, c. 53, s. 181]

Jurisdiction is in the Court of Queen's Bench; the initiating form is prescribed as a Petition. As mentioned supra, Supreme Court Rules 754 and ff. are specifically directed to the procedure to be followed in a Winding-up.

See Re Pe Ben Pipelines Ltd , 7 Alta L.R. (2d) 174.

[The Companies Act, R.S.A. 1970, c. 60]

Where no liquidator has been appointed or is acting, the Court may appoint one: or the Court may remove a liquidator who is unsatisfactory, upon the application of a contributory or of a meeting of creditors.

Section 243 (1) If, from any cause whatever there is no liquidator acting, the court may, on the application of a contributory, appoint a liquidator.

(2) The court may, on cause shown, remove a liquidator and appoint another liquidator. [R.S.A. 1955, c. 53, s. 225]

Section 251 (3) [At a meeting called by the liquidator and advertised by him in the Gazette, notice of which meeting is served upon all creditors, if the meeting decides to apply for a joint liquidator or someone to serve in his stead,] an application may be made ... to the court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose by the meeting.

(4)[The court may appoint another liquidator, remove the one acting, appoint a committee, or make any other order that seems just] and (5) there is no appeal from the Order.

No cases are reported and the form of application is not set out in the Act.

[In a voluntary winding up] application by a creditor or a member or a liquidator "for the determination of any question".

Section 256 (1) Where a company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers that the court might exercise if the company were being wound up by the Court.

(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the court thinks fit, or may make such other order on the application as the court thinks just. [R.S.A. 1955, c. 53, s. 237]

The form of the application is left undefined. Possibly since the winding up Petition procedure envisages a series of applications rather than one presentation of Petition and a consequent Order, the application for advice and directions might be interlocutory.

In Canadian Pittsburgh Industries Ltd v Roberts & Hall Ltd [1973]

32 D.L.R. (3d) 766, the application was brought by Originating Notice of Motion and the trial of an issue was directed by Riley, J. The question concerned certain debentures and whether or not they were invalid as a fraudulent preference. No issue was raised with respect to the form of the application.

On an application for advice and directions under the Companies Act, query in a proper case whether one could invoke the principle enunciated in Re: George Estate (1959-60) 30 W.W.R. 462, quoted supra at page 7 of Sched II.

Appeal against a compromise arrangement entered into under the provisions of s. 247 by the liquidator.

Section 257 Any creditor or contributory may, within two weeks from the date when a compromise or arrangement is entered into under Section 247, appeal to the court against it, and the court may thereupon, as it thinks just, amend, vary or confirm the compromise or arrangement. [R.S.A. 1955, c. 53, s. 239]

No cases are reported and semble the application would seem to call for invoking Part 30.

Application to compel a director to compensate the Company for funds misapplied or retained to the prejudice of the company

Section 270(1) Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof, with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company, by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just.

[R.S.A. 1955, c. 53, s. 251]

No cases are reported in Alberta and the procedure is not prescribed. Again, semble it calls for Part 30 or for an interlocutory application in the winding-up process.

[The Companies Act, R.S.A. 1970, c. 60]

Application for an Order declaring void the dissolution of the Company.

Section 272. (1) Where a company has been dissolved, the court may at any time within one year of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

During liquidation:

Application for leave to disclaim property of the Company which is burdensome and binds the Company to covenants which are onerous.

Section 277. [paraphrased] sections 277 (1) to (5) inclusive
Where property of a company in liquidation is not readily saleable by reason of onerous incidents attached to it and where it is not in the best interests of the company or the company's creditors to retain the same, the liquidator may disclaim the property with the permission of the court. See also subsection (9)

The full text of the statute appears at page 11681 of the Alberta Corporations Manual, [Statutes].

Application by third party for rescission of contract with the Company

Section 277(6) [During the process of liquidation of a company] the Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract or otherwise as the court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

Application by a person claiming an interest in disclaimed property.

Section 277(7) and (8) [text in full at page 11682 of the A.C.M.]
The court may, on the application of a person who claims an interest or is under liability in respect of disclaimed property, deal with such interest as may be just: subject to the provisos set out in 277(8) which limit the court's power in respect of leasehold property.

The procedure in respect of the above applications is not set out in the Act and there are no cases reported in Alberta.

CONDITIONAL SALES ACT, R.S.A. 1970, c. 61, as amended 1973

Application for an Order permitting rectification of an omission or a misstatement of a Conditional Sales Contract on such terms as the Court may direct

Section 13. (2) Subject to the rights of other persons accrued by reason of any omission or misstatement referred to in this subsection, a judge of the Court of Queen's Bench, on being satisfied that any omission or misstatement in any document filed under this Act was accidental or due to any other sufficient cause, may in his discretion order the omission or misstatement to be rectified, on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter or thing as the judge sees fit to direct.

There are no cases reported. The statute by adverting to the power of the Court to prescribe notice, as well as by omitting to prescribe a form, places the application within the purview of Part 30.

CONDOMINIUM PROPERTY ACT, R.S.A. 1970, c. 62

All of the applications under this Act are directed to be brought by Petition.

Application for an Order permitting the appointment of the Public Trustee or of some other person to vote where the owner is incapable of doing so.

Section 16 (2) Where the Court of Queen's Bench, upon the application of the corporation or of any owner, is satisfied that there is no person capable, willing or reasonably available to vote in respect of a unit, the Court of Queen's Bench

(a) shall, in cases where a unanimous resolution is required by this Act, and

(b) may, in its discretion, in any other case,

appoint the Public Trustee or some other fit and proper person for the purpose of exercising such of the powers of voting under this Act and the by-laws as the Court of Queen's Bench determines.

Application by the corporation or by any person interested, for the appointment of an administrator (or for the replacement of an administrator)

Section 28 (1) A corporation or any person having an interest in a unit may apply to the Court of Queen's Bench for appointment of an administrator. (2) (3) (4) (5) paraphrased

[The Court may appoint, at discretion, for such time as it deems proper, an administrator who has power to delegate the powers of the corporation or as the case may be, with remuneration

[Condominium Property Act, R.S.A. 1970, c. 62]

fixed by the Court, which are administrative expenses within the meaning of the Act]

(6) The Court of Queen's Bench may in its discretion upon the application of an administrator or any person referred to in subsection (1), remove or replace the administrator. [1966, c.19 s.28]

Application for the termination of the Condominium Status of a building.

Section 31 (1) An application to terminate the condominium status of a building may be made to the Court of Queen's Bench by the corporation or by an owner or by a registered mortgagee of a unit.

(2) On an application under this section, if the Court of Queen's Bench is satisfied that, having regard to the rights and interests of the owners as a whole, it is just and equitable that the condominium status of the building should be terminated, the Court may make a declaration to that effect.

(3) Where a declaration has been made pursuant to subsection (2), the Court of Queen's Bench may, by order, impose such conditions and give such directions, including directions for the payment of money, as it thinks fit for the purpose of adjusting as between the corporation and the owners and as amongst the owners themselves the effect of the declaration.

(4) On any application to the Court of Queen's Bench under this section any insurer who has effected insurance on the building or any part thereof, being insurance against destruction of units or damage to the building, has the right to appear in person or by agent or counsel. [1966, c. 19, s. 31]

Application for dissolution of a Condominium Corporation

Section 34 (1) The Court of Queen's Bench on the application of a corporation or any member thereof or an administrator appointed under section 28 may, by order, provide for the winding up of the affairs of a corporation.

(2) By the same or subsequent order the Court of Queen's Bench may declare the corporation dissolved as on and from a date specified in the order. [1966, c. 19, s. 34]

There are no cases on the procedure under the Act. Section 39, however, sets out the wide discretion of the Court as to deciding on procedural matters and s. 39.1 (1978, c.9, s.24) gives the Court power to vary any Order.

CONTROVERTED ELECTIONS ACT, R.S.A. 1970, c. 66

Application of a defeated candidate or elector in an electoral division for an Order quashing the election of a Member of the Legislative Assembly.

Section 3 At any time within thirty days after the name of the candidate elected for any electoral division has been published in the Alberta Gazette, as directed by The Election Act, any defeated candidate or any person who, at the time the election was held, was a qualified elector of that electoral division, may petition against the undue return or undue election of any candidate of that election.
[R.S.A. 1955, c. 57, s. 3]

The entire Act refers to procedure:
Section 4 prescribes the form of the Petition and its contents. (*)
Section 5 provides for security for costs of $500.
Section 6 sets out manner of service and Section 7 provides for extension of time for service.
Section 8, (*) deals with endorsements on the Petition and
Section 9 and 10 are for the Respondent and his application in reply.

Section 19 provides that applications to the Judge shall be made in chambers and unless authorized to be made ex parte they shall be made by Notice of Motion. There is specific provision, however, for the Petition to be heard in open court as a trial (section 20).

Melnychuk v Heard (1963) 45 W.W.R. 257 was a petition praying for the setting aside of an election on the grounds that "Dr" was added to the candidate's name upon the ballot: it is not directly on the point of procedure but is of assistance as an exemplar.

CO-OPERATIVE ASSOCIATIONS ACT, R.S.A. 1970, c. 67, as amended

Section 28(3) [regarding meetings of the incorporated Co-Operative]
If it is impracticable to call a meeting of the association in the manner provided by the by-laws a Judge of the Court of Queen's Bench may on application to him for that purpose prescribe the manner of calling such meeting.
No cases; no direction as to how the application is to be brought.

Section 19 provides for a direction by the Court of Queen's Bench in respect of service of the notice of the Co-Operative's intention to redeem preference shares, where no address for service appears for the preference shareholder.

[Co-Operative Associations Act, R.S.A. 1970, c. 67, as amended]

Application by Liquidator for the fixing of his remuneration by the Court of Queen's Bench

Section 48 provides for the fixing by a judge of the Court of Queen's Bench of the remuneration of a liquidator who is not the Director of Co-Operative Activities appointed under the Act.

Application by Liquidator for directions relating to the filing of his Accounts

Section 49 (1) When the liquidator has realized all of the property of the Association [and prepared his accounts]
he shall apply to a judge of the Court of Queen's Bench for directions relating to the filing of his accounts and to fix a day for the hearing of an application to a judge of the Court of Queen's Bench for an order approving the liquidator's accounts and fixing his remuneration and discharging the liquidator and declaring the association dissolved.

No cases are reported on the procedural aspects of the Statute and the administration of Co-Operative Associations is largely carried out under the aegis of the Director of Co-Operative Activities, who is directly responsible to the Minister.

CREDIT UNION ACT, R.S.A. 1970, c. 74

Application for directions relating to filing the Accounts of the Liquidator and fixing a day for hearing, and for an Order approving the liquidator's accounts

Section 75(12) When the liquidator has realized all of the property of the Association [and prepared his accounts]
he shall apply to a judge of the Court of Queen's Bench for directions relating to the filing of his accounts and to fix a day for the hearing of an application to a judge of the Court of Queen's Bench for an Order approving the liquidator's accounts and fixing his remuneration and discharging the liquidator and declaring the credit union dissolved.

No cases are reported on the procedural aspects of the Statute and the administration of Credit Unions is largely carried on under the aegis of the Director, responsible to the Minister.

CRIMINAL INJURIES COMPENSATION ACT, R.S.A. 1970, c. 75

Appeal from an Order of the Board upon a question only of law or jurisdiction.

Section 22(1) Upon a question of jurisdiction or on a question of law, an appeal lies from an order or decision of the Board to the Court of Appeal.

(2) Except as provided in ss(1) there is no appeal from an order or decision of the Board and its proceedings, orders and decisions are not reviewable by any court of law or by certiorari, mandamus, prohibition, injunction or other proceeding.

No procedure is set out and there are no cases.
The appeal provided for in Section 22(1) is a certiorari in fact, but in the light of ss (2) the Notice of Motion for review by certiorari is clearly not proper. (Rule 738(1))

CROP PAYMENTS ACT, R.S.A. 1970, c. 77

Application for relief from payments under an Agreement for Sale or a mortgage, when those payments are made by share of Crop under the Agreement. [Does not apply to crop payments for Irrigated Land]

Section 6. (1) If a farmer is under an obligation to deliver a share of a crop on account of any indebtedness under any agreement for the sale of land or any mortgage, the farmer may apply for relief to a judge of the Court of Queen's Bench in the district in which the crop is grown.

(2) the judge upon such notice to the persons entitled to receive the share of crop as he deems proper, may proceed to hear the application in such manner as he deems proper.

(3) If it appears to the judge that in the circumstances the delivery of the full share of the crop

(a) will leave the applicant without a reasonable return out of the crop and

(b) will render him unable to carry on his farming operations,

the judge shall determine what amount, if any, of the crop in his opinion is to be delivered by the applicant on account of the deliverable share of the crop for that year, and order that upon delivery of that amount being made to the person entitled to receive the share in the crop, the interest in the crop of the person so entitled ceases. [R.S.A. 1955, c.69, s.6]

No procedure prescribed; no cases.

DENTAL ASSOCIATION ACT, R.S.A. 1970, c. 77

Application to the Court by way of appeal from a suspension or removal from the Register.

Section 43(1) A person whose name has been removed from the register or who has been suspended from practice by order of the board may appeal from the order to a judge of the Court of Queen's Bench at any time within two months after the date of the service of the order of the board upon him.

(2) Notice of the appeal shall be filed in the office of the Court of Queen's Bench at Edmonton or Calgary within the required time and a copy thereof served upon the registrar of the association.

(3) the registrar, after the service of notice of appeal and upon request, shall furnish to the appellant a copy of all documents required for the consideration of the judge. [RSA 1955 c. 82, s. 57; [S.A. 1964, c. 20, s. 19; 1978, c. 51, s. 28]

Section 44 sets out what the Judge shall consider by way of evidence and gives the judge power to make any Order that seems just to him. Service is provided for in Section 45.
The judge may direct a trial to take place for the determination of an issue upon the appeal. No cases reported.

DENTAL AUXILIARIES ACT, R.S.A. 1970, c. 91.

Appeal from suspension or removal from the Register.

Section 14(1) A person whose name has been removed from the register or who has been suspended from practise by order of the committee may appeal from the order to a judge of the Court of Queen's Bench at any time within two months after the date of the service of the order of the committee upon him.

(2) Notice of appeal shall be filed in the office of the Court of Queen's Bench at Edmonton within the required time and a copy thereof served upon the committee.

(3) The committee, after the service of notice of appeal and upon request, shall furnish to the appellant a copy of all documents required for the consideration of the judge.

Section 15 sets out what the judge shall consider by way of evidence and leaves the judge free to make such order as seems just to him. Service is provided for in section 16.
Unlike the Dental Association Act, however, this statute does not in terms permit the court to direct the trial of an issue.
No cases.

DENTAL MECHANICS ACT, R.S.A. 1970, c. 92

Appeal from suspension or expulsion from the Society.

Section 14 (6) A member suspended or expelled from the Society may appeal from the decision of the council to a judge of the Court of Queen's Bench of Alberta at any time within fourteen days from the date of the order or the resolution of suspension or expulsion or within such further time as a judge of the Court of Queen's Bench may order.

Section 14(7) provides that a copy of the evidence heard by council shall be filed in Court and 14(8) permits the judge to make such order or direction as may be just: but no mention is made of the judge's hearing additional evidence, nor of the direction of an issue. No prescribed form and no cases.

DEPENDENT ADULTS' ACT, S.A. 1976, c. 63

Application by "any interested person" (defined in section 1(i), for the appointment of a guardian for a dependent adult.

Section 2(1) Subject to this Section and section 3, any interested person may apply to the Court for an order appointing
(a) a plenary guardian, or
(b) a partial guardian
in respect of a person 18 years or older.

Contents of the Application are carefully and completely spelled out in the Section; Section 3 provides for service and Section 4 provides for the inquiries which shall be made by the Court. The Order is described in Division 2 of the Act and s. 9 sets out the authority of a plenary guardian, s. 10 the areas of competence of a partial guardian.

No form is prescribed, although the contents of the application are implicit in the detailed provisions of the Act. Petition has been used most commonly, though there is no statutory authority therefor.

Application for a review of a Guardianship order.

Section 15(1) Nothing in this Act or an order of the Court made under this Act prevents a dependent adult or any interested person on his behalf from applying to the Court for a review of a guardianship order at any time.

"interested person" is defined in the Statute (Section 1(i) and would not seem to exclude any person whatever who may be sui juris and 'interested' in the usual sense of that word.

[Dependent Adults Act, S.A. 1976, c. 63]

The Statute provides for service upon all parties, dispensing with service where appropriate, and sets out the wide powers of the Court to deal with the Review.

Application by "any interested person" for appointment of a trustee for the estate of a Dependent Adult.

Section 21 (1)Subject to this section and section 22, any interested person may apply to the Court for an order appointing a trustee in respect of the estate of a person 18 years of age or over.

The provisions are similar to those respecting personal guardianship and the Statute sets out the contents of the application, the persons who must have notice and the inquiries which shall be made by the Court.

Appeal from guardianship Order, Trusteeship Order or an Order by an Appeal panel.

Section 67 (1) Within 21 days, or such further time as the Court of Queen's Bench may permit, of
(a) the making of a guardianship order or a trusteeship order, or
(b) the making of an order by an appeal panel,
the dependent adult, any person in respect of whom a certificate of incapacity is issued or any interested person on behalf of either of them, may appeal to the Court of Queen's Bench by way of originating notice.

(2) The originating notice shall be served upon
(a) any guardian and trustee,
(b) the Public Trustee and the Public Guardian if they are not served pursuant to clause (a),
(c) where the appellant is a resident of a facility, the person in charge of a facility, and
(d) such other persons as the Court may direct,
not less than 15 days before the motion is returnable and the practice and procedure of the Court of Queen's Bench pertaining to applications by originating notice applies, so far as it is applicable, to an application under this section, except as otherwise provided by this section.

(3) The notice of appeal shall be supported by an affidavit of the applicant setting forth fully all the facts in support of his appeal.

Note that the originating document is specifically stated to be an originating notice and the Statute in (3) speaks of Notice of Appeal.

[Dependent Adults Act, S.A. 1976, c. 63]

(4) In addition to the evidence adduced by the applicant, the Court of Queen's Bench may direct such further evidence to be given as it considers necessary.

(5) The Court of Queen's Bench may make whatever order as to the costs of the application as it considers fit;

(6) The Court of Queen's Bench may reverse, confirm or vary the order of the Surrogate Court or the appeal panel or may make such other order as it considers just.

No cases are reported on the procedure. The launching of an appeal by Originating Notice is, as Stevenson J. has said, unusual, but the form is prescribed by the Statute and must be used. Note, however, that the 10 days' notice dictated by Rule 410 are increased by Section 67(2)(d) to 15 days and the service shall be "upon such persons as the Court may direct" which obliges the applicant to attend upon the judge for the purpose of obtaining suitable direction and this would indicate that a Part 30 application would better have served the purpose of the framers in ensuring that the Court had an early opportunity to direct the proceedings.

DEVOLUTION OF REAL PROPERTY ACT, R.S.A. 1970, c. 109

Application to compel the personal representative of a deceased person to convey real property to the beneficiary or to sell real property.

Section 9. (3) At any time after the expiration of one year from the date of the grant of probate or of letters of administration, if the personal representative has failed when requested by the person entitled to any real property, to convey the real property to that person, the Court if it thinks fit, on the application of that person and after notice to the personal representative, may order that the conveyance be made, and may in default make an order vesting the real property in that person as fully and completely as might have been done by a conveyance thereof from the personal representative.

(4) If, after the expiration of one year, the personal representative has failed, with respect to the real property or a portion thereof, either to convey it to a person entitled thereto or to sell and dispose of it, the Court on the application of a person beneficially interested, may order that the real property or portion be sold on any terms and within any period which appears reasonable, and on the failure of the personal representative to comply with the order may direct a sale of the real property or portion upon such terms of cash or credit, or partly one and partly the other,

as the Court considers advisable. [R.S.A. 1955, c. 83, s.9]

See the Alberta Rules of Court, Rule 414(c) which reads

> 414. Without prejudice to the generality of Rule 412 proceedings may be brought by originating notice for any of the following reliefs:
>
> ... (c) an order directing a person to do or abstain from doing a particular act in his capacity as executor, administrator or trustee.

The application of Rule 414 brings into play the provisions of Rule 415: specifically 415(1) as to 'parties'.

No cases are reported on the section, and none on the rule.

Application under the Act for an Order binding contingent interests and interests not yet vested, and binding the interests of dependent adults, non-concurring persons and beneficiaries not yet ascertained, or the interests of infants and respecting

- a sale of real property (Section 11)
- an option to purchase real property (Section 13(4))

Section 11. (1) Subject to the provisions hereinafter contained, no sale of real property for the purpose of distribution only is valid as respects any person beneficially interested, unless that person concurs therein.

(2) Where, in the sale of real property

(a) a dependent adult is beneficially interested or

(b) adult beneficiaries do not concur in the sale, or

(c) under a will there are contingent interests or interests not yet vested, or

(d) the persons who might be beneficiaries are not yet ascertained,

the Court, upon proof satisfactory to it that the sale is in the interest and to the advantage of the estate of the deceased and the persons beneficially interested therein, may approve the sale, and any sale so approved is valid as respects the contingent interests and interests not yet vested, and is binding upon the dependent adult, non-concurring persons and beneficiaries not yet ascertained.

(3) If an adult beneficiary accepts a share of the purchase money, knowing it to be such, he shall be deemed to have concurred in the sale. [R.S.A. 1955, c. 83, s. 11; S.A. 1976, c. 63, s. 87(b)]

[Devolution of Real Property Act, R.S.A. 1970, c. 109]

Section 12 (1) No sale, where an infant is interested, is valid without the written consent or approval of the Public Trustee, or, in the absence of that consent or approval, without an order of the Court.

(2) A sale of preal property made with the consent or approval of the Public Trustee or the Court under this section is binding on the infant interested therein.

[R.S.A. 1955, c. 83, s.12;
1970, c. 31, s.2]

Section 13 (1) Subject to the provisions of this section, the personal representative may grant an option to purchase real property in any case where he is empowered to sell that real property, if the period within which the option may be exercised is not longer than one year from the date on which the instrument granting the option is executed.

(2) A grant by the personal representative of an option to purchase real property is invalid unless he obtains

(a) any concurrence of any person under section 10 [which section provides that beneficiaries must concur in any sale which is made for the purpose of distribution only]
or section 11 (1) or

(b) any order of the Court under section 11(2) or section 12 or

(c) any consent or approval of the Public Trustee under section 12,

that he would be required to obtain if the granting of the option to purchase the real property were instead the sale of that real property.

(3) A concurrence, order, consent or approval to the granting of an option to purchase real property referred to in (2) when made or given extends also to any sale of that property made upon the exercise of the option and in accordance with the instrument granting the option.

(4) Where a grant by a personal representative of an option to purchase real property is approved by an order of the Court, the grant is valid as respects the contingent interests and interests not yet vested, and is binding upon the dependent adult, non-concurring persons and beneficiaries not yet ascertained and infants.

(5) If an adult beneficiary accepts a share of the consideration given for the grant of the option to purchase, knowing it to be such, he shall be deemed to have concurred in the grant of the option.

[R.S.A. 1970, c. 31, s. 3; S.A. 1976, c. 63, s. 87]

[Devolution of Real Property Act, R.S.A. 1970, c. 109]

Nothing in the Statute prescribes the manner of bringing the application. This leaves the practitioner to proceed either under Part 30 which obtains when

[394 (b) no procedure for an application to the court or a judge is provided]

or pursuant to Rule 414(d) which provides that proceedings may be brought by originating notice for an order approving any sale, purchase, compromise or other transaction by a person in his capacity as executor, administrator or trustee. Cf. Rr. 415, 417.

There are no cases reported either on the section or on the Rule. One would expect, however, that the Court or a judge would require some cogent affidavit evidence to the effect that the sale is in the best interests of the estate.

It would be of interest to know whether for the purposes of this Statute, an interest in minerals is an interest in land.

Application for an Order approving lease in excess of one year, or mortgage of the Realty.

Section 15 (1) The personal representative may, from time to time, subject to the provisions of any will affecting the property, do any one or more of the following:

(a) lease the real property or a part thereof for a term of not more than one year;

(b) lease the real property or a part thereof, with the approval of the Court, for a longer term;

(c) raise money by way of mortgage of the real property or a part thereof, for the payment of debts, or for payment of taxes on the real property to be mortgaged, and, with the approval of the Court, for the payment of other taxes, the erection, repair, improvement or completion of buildings, or the improvement of lands, or for any other purpose beneficial to the estate.

(2) Where infants or dependent adults are interested, the approvals or order required by sections 11 and 12 in case of a sale are required in the case of a mortgage, under subsection (1), clause (c), for payment of debts or payment of taxes on the real property to be mortgaged. [R.S.A. 1955, c. 83, s.14; 1976, c. 63, s.87]

No cases; no prescribed form of application. The Rules of Court (Rule 414(d)), would appear to apply; as mentioned supra one must have regard to Rule 415 and Rule 417.

DOMESTIC RELATIONS ACT, R.S.A. 1970, c. 113

Appeal from a protection order of a family court judge.

The procedure is set out in detail in the Canadian Family Law Guide sections of which follow:

[¶ 36-499].

(8) *Appeal.* — A party to proceedings under this section who is aggrieved by an order or refusal to make an order pursuant to this section may appeal to the Court of Queen's Bench and the provisions of Part XXIV of the *Criminal Code* will apply with all necessary modifications with respect to the appeal.

(1978, c. 51, s. 38(14).)

[¶ 36-500]

(9) [*Service of notice*]. — Notwithstanding anything in subsection (8), a judge of the court to which the appeal is being taken, by order

(*a*) may, where service cannot be effected upon the provincial judge who made the order or refusal, direct that service be made upon some other person in place of the provincial judge,

(*b*) may, where service cannot be effected upon the opposite party, make such order for substituted or other service or for substitution for service of the notice by letter, public advertisement or otherwise as appears just, or may dispense with service, and

(*c*) may fix, before or after the expiration of the period prescribed for service by subsection (8), a further period not exceeding 20 days within which any service required to be made pursuant to subsection (8) or this subsection may be effected. (1977, c. 64, s. 2.)

[¶ 36-501]

(10) [*Filing of appeal*]. — Immediately upon receipt of the notice served pursuant to subsection (8) or (9) the provincial judge or other person served in his stead shall forward it, together with the document containing the order or refusal, all other documents relating thereto, and the notes or a transcript of the evidence taken at the hearing, to the clerk of the Court of Queen's Bench for the judicial district within which the application was made. (1977, c. 64, s. 2; 1978, c. 51, s. 38(14).)

[¶ 36-502]

(11) [*Date of hearing*].—When subsection (10) has been complied with the clerk shall notify the court, which shall fix a place and a time that is not sooner than 14 days from the date it was so notified, for the hearing of the appeal. (1978, c. 51, s. 38(14).)

[¶ 36-503]

(12) [*Notice of hearing*]. — The clerk or deputy clerk, as the case may be, shall send by registered mail a notice of the time and place of the appeal to all parties thereto at least 10 days before the date fixed for the hearing.

[¶ 36-504]

(13) [*Adjournment*]. — The court may adjourn the hearing of the appeal from time to time, and from one place to another, and may fix a new time and place and give directions to the clerk relating to notices to be given to the parties as the court thinks fit. (1978, c. 51, s. 38(14).)

[¶ 36-505]

(14) *Rehearing on merits.* — Repealed. (1978, c. 51, s. 38(14), effective June 30, 1979.)

[¶ 36-506]

(15) [*Powers of court*]. — The court in determining an appeal may

(*a*) set aside, confirm or vary an order made by the provincial judge, or make any other order mentioned in this section and warranted by the evidence, and

(*b*) make any order it considers appropriate relating to the costs of the appeal and the amount of them.

(1977, c. 64, s. 2; 1978, c. 51, s. 38(14).)

[¶ 36-507]

(16) [*Effect of order*]. — An order made under subsection (15)

(*a*) shall be transmitted by the clerk or deputy clerk, as the case may be, to the provincial judge together with the papers and documents transmitted by him, and

(*b*) is enforceable in the same manner as if such order had been originally made by the provincial judge.

(1977, c. 64, s. 2.)

(1977, c. 64, ss. 2, 4; 1978, c. 51, s. 38(14).)

[Domestic Relations Act, R.S.A. 1970, c. 113]

Appeals have most often succeeded upon the basis of a want of jurisdiction in the Family Court Judge.
- there is no jurisdiction in Family Court to vary a custodial arrangement entered into by agreement.
Bensmiller v Bensmiller [1974] 3 W.W.R. 571
- while the Family Court may have jurisdiction to entertain an application for access by the father of an illegitimate child, McDermid, J.A., in White v Barrett [1973] 3 W.W.R. 293, said "in the light of section 39 of the Domestic Relations Act, I have doubts as to whether the Family Court has jurisdiction over custody".

Application by or for an Infant, for the appointment of a Guardian, or for the removal of a Guardian.

Section 41 - The Court may from time to time appoint a guardian of an infant to act jointly with the father or mother of the infant or with the guardian appointed by the deceased father or mother of the infant.

Section 42 - If upon the application of an infant, or of anyone on behalf of the infant, it appears
(a) that the infant has no parent or lawful guardian, or
(b) that the parent or lawful guardian is not a fit and proper person to have the guardianship of the infant,
the Court may appoint a guardian or guardians of the infant.

Section 43 - (1) Testamentary guardians and guardians appointed by Order or letters of guardianship are removable by the Court for the same causes for which trustees are removable.

Application may be made to the Queen's Bench or to the Surrogate Court for the appointment of a guardian for an infant or for the removal of a guardian appointed.
An Application for Guardianship appears in the Surrogate Court Rules. No form is prescribed for an application for the removal of a guardian or for the substitution of a guardian.

Cases: Re: M [1973] 11 F.L.R. 232; 37 D.L.R. (3d) 748, is authority for the proposition that 'father' in the Domestic Relations Act includes 'natural father' and that 'child' includes 'illegitimate child'. Authorities are quoted: White v Barrett [1973] 3 W.W.R. 293; 35 D.L.R. (3d) 408 (Alberta Court of Appeal); Regina v Gingell, [1973] 6 W.W.R. 678; 42 D.L.R. (3d) 225.

[Domestic Relations Act, R.S.A. 1970, c. 113]

Application by a Guardian for leave to resign his charge

Section 43(2) A guardian referred to in ss(1) by leave of the Court may resign his office on such terms and conditions as the Court deems just.

No directions as to application. No cases.

Application for Custody and right of Access.

Section 45 (2) If the parents fail to reach an agreement on [which parent will have the custody, control and education of the children of the marriage, where they are living apart, are divorced or judicially separated], either parent may apply to the Court for its decision.

Section 46 (1) Upon the application of
(a) the father or mother of an infant, or
(b) an infant, who may apply without a next friend,
the Court may make such order as it sees fit regarding the custody of the infant and the right of access to the infant of either parent.

The Statute then provides (s. 46(2) for the factors the court shall consider; 46(3) the powers of the Court; 46(4) costs of the application; 46(5) Maintenance order. The Statute recites the instances in which the Court should refuse to make an Order and deals with the matter of a parent's right to choose the religion of the child.

The Statute does not provide for the form of application. Originating Notice is common but without authorization. Petition is sometimes used and also without authorization.
The Court is the Court of Queen's Bench or a Judge of the Surrogate Court sitting in Chambers (Section 37 of the Act)

The Cases: - Goldstein v Goldstein [1976] 4 W.W.R. 646 Maintenance and custody after divorce are subject to the Divorce Act but notwithstanding, the Divorce Act does not oust the jurisdiction of the Court which is conferred by the Provincial statute with respect to the custody of the children and their maintenance.

Smith v Koch [1976] 3 W.W.R. 346. An adoption order in favour of a mother and her husband was made under the Child Welfare Act (which Act does not allow of conditions); so contemporaneously an Order was made under 46(1) of the Domestic Relations Act granting access to the natural father. This remarkable feat of judicial agility is explained in detail in the judgment.

[Domestic Relations Act, R.S.A. 1970 c. 113]

Application for the production of a child - result of parent's desertion
See Application for an Order in the nature of Habeas Corpus

Section 47(2) If upon an application made by a parent or other responsible person for an order for the production or custody of an infant the Court is of the opinion that the parent or other responsible person

(a) has abandoned or deserted the infant or

(b) has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the infant,

the Court may, in its discretion, decline to make the order applied for. [R.S.A. 1955, c. 89, s. 50]

Application for an Order varying an Order for Alimony or Maintenance

Section 26 (1) In a case in which an order has been made for the payment of alimony, or for the payment of maintenance in an action for alimony, divorce, judicial separation, a declaration of nullity or restitution of conjugal rights, upon it being made to appear

(a) that the means of either the husband or the wife have increased or decreased, or

(b) that the husband or the wife has been guilty of misconduct or, being divorced, has married again,

the Court may from time to time vary or modify the order either by altering the times of payment or by increasing or decreasing the amount, or may temporarily suspend the order as to the whole or any part of the money so ordered to be paid and may again revive the order wholly or in part, as the Court thinks fit. [1973, c. 61, s. 5(15)]

There is nothing in the Statute which indicates how the application is to be brought but semble it may be launched as a notice of motion in the original action although the file may be closed. Indeed,

> Unless there is an Order in existence at the time of the application to vary it, the application cannot succeed and where an Order has been discharged upon consent there is no jurisdiction to vary the Order. Fowler v Fowler, [1950] 1 W.W.R. 406
>
> Also, (at page 411 of the Fowler judgment, supra,
> - there is no right on an application to vary to adduce de novo matters which were before the trial judge. New matters only are admissible.

THE DOWER ACT, R.S.A. 1970, Ch 114

Application for an Order dispensing with the consent of a spouse to the disposition by a living spouse of the homestead, or to the disposition of the homestead by the personal representative of a deceased spouse. NOTE that Dower Rights also attach to the mines and minerals (Section 25) and that, although the Act does not specifically say so, this application should also be proper where consent to disposition of the m/m is not forthcoming.

Section 11. (1) A married person who wishes to make a disposition of his homestead and who cannot obtain the consent of his spouse
(a) where the married person and his spouse are living apart
or (b) where the spouse has not since the marriage lived in the Province, or
(c) where the whereabouts of the spouse is unknown, or
(d) where the married person has two or more homesteads, or
(e) where the spouse has executed an agreement in writing and for valuable consideration to release the claim of the spouse to dower pursuant to section 10, or
(f) where the spouse is a [dependant adult]
may apply by notice of motion to a judge for an order dispensing with the consent of the spouse to the proposed disposition.

The judge is a judge of the Court of Queen's Bench: not specifically by the statute authorized to hear the application in chambers, unless the word 'judge' as distinguished from 'court' bears that connotation. The application is to be brought by Notice of Motion: but one must have regard to Rule 88 and 89, and the comments of the Master in Sanders v Nousek, quoted supra, could apply to this application.

Sections 11 (2) and (3) provide for dispensing with service of the notice in a proper case and Section 11(4) lists factors for the consideration of the judge, which factors, however, are not exclusive and the judge may consider "any matters as in his opinion relate to the application".

Sections 11(5) and (6) provide for the Order and (7) for its filing at Land Titles.

Section 23(1) provides for an application by a personal representative and the Statute reads

> Where at the time of the death of a married person the spouse of the married person is living apart from the married person under circumstances that would disentitle the spouse to alimony, no life estate vests in the spouse and the spouse takes no benefit under this Act.
>
> (2) In any such case or in a case where the deceased person while alive could have made an application for an order dispensing with the consent of the spouse to a disposition, the executor or

administrator of the estate of the deceased married person may apply to a judge by notice of motion for an order dispensing with the consent of the surviving spouse to a disposition.
[R.S.A. 1955, c. 90, s. 23; S.A. 1973, c. 61, s. 6]

There are numerous cases on Dower: among them the following which are particularly noteworthy.
Gates v Gates [1974] 1 W.W.R. 618, (TD) discusses the status of a dower right in the bankruptcy of a spouse. The wife possesses a right which does not pass to the Trustee upon the bankruptcy of the Husband. Discussion as to whether this is an inchoate right which only arises on the death of the Husband.
The Nature of the Dower Right is discussed at R.F.L. Vol. 29, page 344, in the judgment in Cebuliak v Cebuliak, [1976] 29 R.F.L. 338, (D.C.)

There does not seem to be any discussion in the cases of the peculiar form of application prescribed by the Act: i.e., Notice of Motion, or of the reason for it.

Closely related to the above application is
Application to obtain an Order designating the one of one or more homesteads to which Dower rights attach, where the surviving spouse has neglected or refused, within 3 months after the date of the death of the deceased, to make his/her election in Form F in the Schedule.

Section 20. (4) If the surviving spouse neglects or refuses to make an election [as between more than one homestead of which the deceased died possessed], the executor or administrator may, at the expiration of three months after the date of the death of the married person, apply by notice of motion to a judge for an order designating the homestead to which the dower rights of the surviving spouse attach.

Once again the form of application is Notice of Motion and the material in support is not set out, but presumably the executor would state that, having been requested, the spouse refused to elect and place before the Court descriptions of the two or more properties concerned.

Application for an Order designating the property of the deceased that is free from seizure under a Writ of Execution and is subject to Dower for the use of the surviving spouse.

Section 24 (1) When a life estate in the homestead vests in the surviving spouse upon the death of a married person, the surviving spouse also has a life estate in the personal property of the deceased that is declared in The Exemptions Act to be free from seizure under a writ of execution in his lifetime and the surviving spouse is entitled to the use and enjoyment of that personal property.

(2) If a dispute arises as to the articles that are included in the personal property referred to in ss (1), the question shall be submitted by way of notice of motion to a judge, who shall summarily decide the question. [R.S.A. 1955, c. 90, s. 24]

The list of chattels in question is set out in the Exemptions Act being R.S.A. 1970, c. 129, section 2 (as amended in 1977).
The application is to be brought by Notice of Motion. There are no cases reported.

Application by judgment creditor spouse who has recovered judgment against a married person for damages under Section 12, for payment out of the Assurance Fund.

Section 14. (1) Where

(a) a spouse recovers a judgment against the married person pursuant to s. 12,
(b) the amount of the judgment is not paid and
(c) the assets of the judgment debtor that are liable to be sold or applied in satisfaction of the judgment or of the balance owing thereon are insufficient to satisfy the judgment or balance owing on the judgment,

the spouse may apply by way of originating notice to a judge of the Court of Queen's Bench for an order directing payment of the unsatisfied judgment out of the Assurance Fund created under The Land Titles Act.

(2) The Originating Notice shall be served
(a) upon the Registrar of the land registration district in which the homestead disposed of is situated and
(b) upon the Attorney General
thirty days before the date on which the originating notice is returnable. [R.S.A. 1955, c. 90, s. 14]

Section 15 prescribes the contents of the affidavit in support of the application [unless the judge otherwise orders] and Section 16 provides that the judge may order payment out of the Assurance Fund. The order is completely discretionary and it is noteworthy that the Statute sets out that the judge may give the order if he is satisfied of the truth of the Applicant's allegations.

No order shall be given for payment out of the assurance fund in respect of a judgment for disposition of mines and minerals. See 25(3) and 25(4).

[The Dower Act, R.S.A. 1970, c. 114]

There are no cases reported. The application is completely discretionary and predicated upon the Judge's belief in the truth of the applicant's allegations.

DRAINAGE DISTRICTS ACT, R.S.A. 1970, c. 115

[The Act provides for the formation of Drainage Districts upon Petition [to that end. Assessment Rolls are thereafter prepared. During the [preparation of the Rolls, the Board of Trustees is constituted a Court [of Revision (ss. 141 to 148) to hear complaints from persons assessed.]

Appeal from the decision of a Court of Revision on a complaint, or, against the omission, neglect or refusal of the Court of Revision to hear a complaint.

Section 154. An appeal to the Court of Queen's Bench lies not only against a decision of the court of revision on a complaint but also against the omission, neglect or refusal of the court of revision to hear or decide a complaint. [R.S.A. 1955, c. 91, s. 154]

155. The person appealing shall, in person or by agent, serve upon the secretary [of the Board] within eight days after the decision, if any, of the court of revision or after the omission, neglect or refusal complained of, a written notice of his intention to appeal to the Court of Queen's Bench. [R.S.A. 1955, c. 91, s. 155]

156. The secretary shall, immediately after the expiration of the time limited for filing notice of appeal, forward a list of the appeals to the clerk or deputy clerk of the judicial district in which the [drainage] district is wholly or partly situated, and a Judge of the Court of Queen's Bench shall fix a day and place for the hearing of the appeals.

It is thereafter provided that the Secretary of the Board shall be the clerk of the Court of Appeals and

164. the decision of the judge is final and conclusive.

The Statute describes the procedure to be followed in hearing the appeals and it is clear that the judge acting here is persona designata and the Court constituted by this section, semble, not properly a court at all.

No cases are reported.

Confirmation of Assessment Return

Sections 178/182 provide for the confirmation by a Judge of the

Court of Queen's Bench of a list of persons who have not paid the assessment imposed upon them by the Board of Trustees. Notice of the hearing is provided for and (Section 182) the Judge hears the objecting parties and their witnesses under oath.

The procedure would seem to be peculiar to the Act and is summary in nature: the Judge's order suffices to vest land which is the subject of an unpaid assessment, in the Board. See s. 182(2) &ff.

There are no cases reported.

THE ELECTION ACT, R.S.A. 1970, c. 117

Major changes have occurred in the Election Act since the 1970 revision. Recounts now take place before a Provincial Judge, [S.A. 1978, c. 51, s. (18)(c) (page 397)] although the application for recount is launched by Originating Notice. Because the Recount is held before a Provincial Judge the application therefor has been left out of this Schedule.

Application for an Order in the nature of Mandamus where the returning officer neglects or refuses to add up votes or to cast a deciding vote.

Section 104(1) If a returning officer wilfully delays, neglects or refuses (a) to add up the votes, or
(b) to declare elected the candidate having the largest number of votes, or
(c) to give his casting vote where he is by law required to do so
or (d) to make the return as required by this Act of the candidate having the largest number of votes
the person aggrieved or any elector who voted at the election may apply to a judge of the Court of Queen's Bench for an order in the nature of a mandamus commanding the returning officer to perform the duty that he is shown to have omitted.

(2) The notice shall be served upon the returning officer and upon any person who was a candidate at the election.

[In respect of service of the notice, see section 35]

(3) In other respects the provisions of The Judicature Act and the rules made thereunder apply to such application.
[Rule 437 of the Rules of Court, Rule 826 and 834 and rr 751/753]

No cases are reported. The procedure, semble, is a combination of the procedure set out in the Act as to service, (s. 35) and of the Crown Practice rules in civil matters.

[The Election Act, R.S.A. 1970, c.117]

Appeal from the decision of the Provincial Judge upon the recount or final addition.

Section 108. (1) If a party desires to appeal from the decision of the [provincial] judge upon the recount or final addition, he may do so by giving to the opposite party or parties, and to the [provincial] judge, within two days after the completion of the recount or final addition, a notice in writing of his intention to appeal and he may, by the notice, limit the appeal to specified ballot papers.

Subsections (2) to (9) inclusive provide for the procedure governing the appeal to a Judge of the Court of Queen's Bench.

The initiating document is a Notice in Writing of Intention to Appeal.

There are no cases reported.

Section 160 (1) Notwithstanding anything in section 159, any claim (against a candidate in respect of an election) that would have been payable if sent in within one month of the day of the declaration may be paid by the candidate by his official agent after that time if the claim is approved by the judge. (sic)
It is not clear whether the judge referred to is a judge of the Court of Queen's Bench or a judge of the Provincial Court.

There are no cases reported, nor any guidance as to how one must approach the Bench for an Order approving the claim.

ENGINEERING AND RELATED PROFESSIONS ACT, R.S.A. 1970, c.124

Appeal against the refusal of the Council to register the appellant because he failed to satisfy the council as to his good character.

Section 20(5) Any person who has been refused registration on the grounds of his failure to satisfy the council as to his good character, may appeal from the council's decision as to his character, to a judge of the Court of Queen's Bench at any time within 30 days after notice of the council's refusal to register him has been served on him in writing.

By Ss. (6) the Court of Queen's Bench may receive further evidence, as it may wish, in addition to the evidence of the proceedings before council and any 'material' considered there.

[Engineering and Related Professions Act, R.S.A. 1970, c. 124]

There are no cases reported.

Appeal against fine, suspension or striking from the register of the appellant or revoking permit.

Section 44 (1) Any person who has been fined or suspended or whose name has been struck from the register may appeal from the order of the council to the Court of Queen's Bench at any time within 30 days after service of the order has been effected upon him in the manner, mutatis mutandis, prescribed for service of notice by s. 32(2).

(2) Any permit holder may appeal an order fining it or revoking a permit, or a refusal to grant or renew a permit, to the Court of Queen's Bench at any time within 30 days after service of the order has been effected.

(3) An appeal, notice of which shall be served upon the registrar (of the council) shall be founded upon

(a) a copy of the proceedings before the discipline committee
and (b) the evidence taken and the order of the council.

(4) The registrar, upon the request of any person desiring to appeal, shall furnish him with a certified copy of all proceedings, reports, orders and papers upon which the council acted in making the order appealed against.

Section 45 provides that the Court of Queen's Bench may confirm or reverse the Order appealed against.

Section 46 provides for a re-hearing, upon the applicant's swearing that there is new evidence: whereupon the council must re-hear the matter but there is no specific provision for a re-hearing by the Court of Queen's Bench sitting in appeal from the Council.

No cases.

EXECUTION CREDITORS ACT, R.S.A. 1970, c. 128

Summary procedure for the adjudication of a claim against an execution debtor. The Act provides that if an execution has gone unsatisfied for nine months from filing with the sheriff or if the sheriff has (at the instance of any creditor) seized the goods of the debtor in satisfaction of a judgment, any other creditor may proceed summarily to prove a claim against that debtor, in forms and according to a procedure spelled out in the Execution Creditors Act. The procedure is spelled out commencing at Section 18, ending at s. 26.

[Execution Creditors Act, R.S.A. 1970 c. 128]

If, having received Notice as provided by the Act (served by single-registered mail) together with the Affidavit in support of the Claim, the debtor does not contest, then judgment may be signed by the Clerk in Form E in the schedule. If the debtor contests,

> Section 22. (1) A judge may, upon notice being given to such persons as he considers proper, proceed to hear and determine in a summary manner the application of a claimant whose claim is contested and for that purpose may
>
> (a) receive evidence either viva voce or by affidavit, or both,
> (b) make an order
> (i) allowing the claim and determining the amount thereof
> or (ii) disallowing the claim and
> (iii) make such order as to the payment of costs as he thinks proper in the circumstances.
>
> If, after notice of contestation, the claimant does not within 10 days (or so much longer as a judge may allow) apply to have his claim heard, he is deemed to have abandoned his claim.

The procedure is peculiar to this Statute; service is (except where otherwise specified) as mentioned supra by single-registered mail (section 44) and the section prescribes the proof of service.

There are few cases, and none upon the procedure. The judge may, of course, direct an issue in which event (Section 25(3)) the trial shall take place in the normal course. The Court may also permit the intervention in the action by a creditor of the defendant where it appears that the creditor who is applying is not carrying on the action in good faith. (Section 22(3)).

Where moneys in the hands of the Sheriff are insufficient to pay all claims filed, the Sheriff shall send to all creditors a proposal for distribution. Creditors have 10 days (or as may be allowed) to object in writing and to set out their grounds therefor. If he wishes to contest, the proposed distribution, the Creditor will make

Application for contesting the scheme of distribution.

> Section 31(7) The person contesting the scheme of distribution, within [10 days or as ordered] shall obtain from the judge an appointment for hearing and determining the matter in dispute.
>
> (8) A copy of the appointment and a notice in writing in Form F in the Schedule, of the objections, stating the grounds therefor, shall be served by the person contesting the scheme of distribution

(a) upon the debtor, unless he himself is the debtor, and
(b) upon the creditors or such of them as the judge may direct and
(c) upon the sheriff.

Semble, the application for 'appointment' might be brought under Part 30 with an Affidavit bringing the applicant within the statute, and it would seem that the appointment might be obtained ex parte.

(10) A judge may
(a) determine a question in dispute in a summary manner, or
(b) direct an action to be brought or an issue to be tried in any court and in any district for the determination of a question in dispute,

and make any order relating to the costs of the proceedings which he considers just.

There is an interesting case reported on a contested scheme of distribution: Wilkinson Company Ltd., David and Szalay v Nemethy, Baksa, Sheriff of the Judicial District of Calgary, Provincial Treasurer of Alberta and Workers Compensation Board 7 Alta L.R. (2d) 30, in the Appellate Division. The Sheriff, from the date of his receipt of moneys, delayed payment out to the writ-holders for a period in excess of 14 days. Meanwhile two creditors obtained judgments and writs and Orders permitting them to share. On appeal, the Orders were vacated and the Court of Appeal held that the delay on the Sheriff's part was irrelevant to the rights of the parties and that those entitled to share were those persons who had subsisting writs at the date of the receipt by the sheriff of the moneys, or who acquired writs within 14 days thereafter.
The provision in the Statute for enlarging the time by Order only comes into operation in cases in which there is insufficient money in the hands of the sheriff to pay all of the subsisting writs. This provision was not brought into play, for at the time (14 days after payment in) there was in the Sheriff's hands sufficient money to cover all subsisting Writs.

The case is important in that, firstly, it is binding and secondly, in that it discusses in a searching and incisive manner the procedure prescribed by the Execution Creditors Act and the Seizures Act.

EXEMPTIONS ACT, R.S.A. 1970, c. 129

Application by a creditor for an Order declaring any specified goods not to be exempt from seizure.

Section 8. (2) A creditor, on notice of motion to the debtor, may apply to a judge for an order declaring any specified goods of the debtor not to be exempt from seizure under this Act. [1966, c. 95, s. 3]

This application is provided for in addition to the one directed in Section 12, in which it is specified that

> If a claim is made for exemptions and a dispute arises thereunder, the sheriff upon his own motion shall refer the matter to a judge of the Court of Queen's Bench for summary determination, upon such notice as the judge may direct. [R.S.A. 1955, c.104, s.10]

A chattel mortgagor, in order to defeat a seizure under the Seizures Act, by claiming that he is entitled to an exemption under this Act, has the onus of proving his entitlement to the exemption: and the onus calls for more than a bare assertion. There must be explicit proof establishing his entitlement to exemption both at the time of the execution of the chattel mortgage and at the time of seizure. Winnicky v Grande Prairie & District Savings & Credit Union [1976] 1 W.W.R. 80, 61 D.L.R. (3d) 559.

When the Sheriff has been instructed under a Writ to seize non-exempt goods, one may assume that he has done so: thereby shifting the onus of proving exemption to the debtor. Where the debtor has been served with notice that the creditor claims the goods not to be exempt, and the debtor does not appear, the Court may reasonably act on the prima facie case established supra; however, where the debtor has not had notice, the Court, careful to protect the debtor's interest, should not act on the prima facie proof that the goods are not exempt. Carmar Holdings Ltd v Harpe [1976] 1 Alta L.R. (2d) 76 which authority serves to underline the importance of showing that the debtor has been served with notice.

EXPROPRIATION ACT, S.A. 1974, c. 27

Application to have compensation fixed by the Court, rather than the Board, where expropriation is accomplished upon behalf of the Crown.

Section 28 (3) Notwithstanding Ss(1) (which provides that the Board shall fix compensation) where the expropriation is by the Crown, the owner may elect to have the compensation fixed by the court and in such case the provisions of this Act relating to the determination of compensation by the Board apply with all necessary modifications to the proceedings before the Court.

THE FAMILY RELIEF ACT, R.S.A. 1970, c 109

Application for provision for proper maintenance and support by spouse or child or by the committee of a dependant (s. 4 or 14(2))

Order for maintenance and support

4. (1) Where a person

(a) dies testate without making in his will adequate provision for the proper maintenance and support of his dependants or any of them, or

(b) dies intestate and the share under *The Intestate Succession Act* of the intestate's dependants or of any of them in the estate is inadequate for their proper maintenance and support,

a judge, on application by or on behalf of the dependants or any of them, may in his discretion, notwithstanding the provisions of the will or *The Intestate Succession Act*, order that such provision as he deems adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

(2) The judge upon the hearing of the application

(a) may inquire into and consider all matters that he deems should be fairly taken into account in deciding upon the application,

(b) may in addition to the evidence adduced by the parties appearing direct such other evidence to be given as he deems necessary or proper, and

(c) may accept such evidence as he deems proper of the deceased's reasons, so far as ascertainable,

(i) for making the dispositions made by his will, or

(ii) for not making adequate provision for a dependant,

including any statement in writing signed by the deceased.

(3) In estimating the weight to be given to a statement referred to in subsection (2), clause (c) the judge shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

(4) The judge may make an order, herein referred to as a suspensory order, suspending in whole or in part the administration of the deceased's estate to the end that application may be made at any subsequent date for an order making specific provision for maintenance and support.

(5) The judge may refuse to make an order in favour of any dependant whose character or conduct is such as in the opinion of the judge disentitles the dependant to the benefit of an order under this Act.

(6) Where a testator dies intestate as to part of his estate, the judge may make an order affecting either the part of the estate as to which the testator died testate or the part as to which he died intestate or as to both such parts. [R.S.A. 1955, c. 109, s. 4]

Conditions and restrictions

6. (1) The judge in any order making provision for maintenance and support of a dependant may impose such conditions and restrictions as he deems fit.

(2) The judge may in his discretion order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to him seems proper.

(3) Such provision may be made out of income or corpus or both and may be made in one or more of the following ways, as the judge deems fit:

(*a*) an amount payable annually or otherwise;

(*b*) a lump sum to be paid or held in trust;

(*c*) any specified property to be transferred or assigned, absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant.

(2) An application may be made

(*a*) by the committee of the estate of a dependant, on behalf of the dependant, where the dependant is one for whose estate a committee has been appointed by the court or designated by statute, and

(*b*) by a parent or by a guardian appointed by the court or by the Public Trustee, on behalf of an infant dependant.

(3) Where a dependant is an infant, or a person of unsound mind, or a person for whose estate the Public Trustee is committee, notice of any application in respect of an estate in which such dependant is interested shall be served upon the Public Trustee and the Public Trustee is entitled to appear and to be heard upon the application.

(4) No costs of or incidental to an application, other than the executor's or administrator's costs, shall be ordered to be paid out of the estate in any case where the value of the net estate, as finally determined by the clerk of the court in fixing probate or administration fees, is less than $5,000.
[R.S.A. 1955, c. 109, s. 14]

When no obligation upon the Public Trustee

15. Where it appears that at the date of the deceased's death the spouses were living together, and

(*a*) all the children of the deceased who at the date of the deceased's death were under the age of 19 years, and

(*b*) all the children of 19 years of age or over who by reason of mental or physical disability were unable to earn a livelihood,

were living with or being supported by the spouses or either of them, there is no obligation on the guardian, Public Trustee or other person representing a child who is a dependant under this Act, to make an application on behalf of the child, if the guardian, Public Trustee, or other person is satisfied that the child is receiving adequate maintenance and support.
[R.S.A. 1955, c. 109, s. 15; 1969, c. 83, s. 3]

Time for making application

16. (1) Subject to subsection (2), no application may be made except within six months from the grant of probate of the will or of administration.

(2) A judge may, if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.
[R.S.A. 1955, c. 109, s. 16]

Application made on behalf of dependant

17. (1) Where an application is made on behalf of a dependant

(a) the judge shall not make any order until he is satisfied upon oath that all persons who are or may be interested in or affected by the order have been served, in accordance with the Alberta Rules of Court, with notice of the application and a copy of this section, and every such person is entitled to be heard in person or by counsel at the hearing, and

(b) the application shall, except as otherwise ordered by the judge, be deemed to be an application on behalf of all dependants who have been so served.

(2) Nothing in this section deprives a dependant who has not actually received notice of an application of any rights such dependant would otherwise have under this Act.
[R.S.A. 1955, c. 109, s. 17]

Distribution of estate

18. (1) Until the expiration of six months from the grant of probate of the will or administration, the executor, administrator or trustee shall not distribute any portion of the estate to any beneficiary without the consent of all of the dependants of the deceased, or unless authorized to do so by order of a judge made on summary application.

(2) Nothing in this Act prevents an executor, administrator or trustee from making reasonable advances for maintenance to dependants who are beneficiaries.

(3) Where an executor, administrator or trustee distributes any portion of the estate in contravention of subsection (1), if any provision for maintenance and support is ordered by a judge to be made out of the estate, the executor or trustee is personally liable to pay the amount of the distribution to the extent that such provision or any part thereof ought, pursuant to the order or this Act, to be made out of the proportion of the estate distributed.
[R.S.A. 1955, c. 109, s. 18]

Estate subject to order

19. (1) Upon notice of any application being given to the executor, administrator or trustee the estate shall be held subject to the provisions of any order that may be made, and the executor, administrator or trustee shall not proceed with the distribution of the estate otherwise than in accordance with such order.

[The Family Relief Act, R.S.A. 1970, c. 109]

(2) Where an executor, administrator or trustee distributes or disposes of any portion of the estate in any manner in contravention of subsection (1), if any provision for maintenance and support is ordered by a judge to be made out of the estate, the executor, administrator or trustee is personally liable to pay the amount of the same to the extent that such provision or any part thereof ought, pursuant to the order or this Act, to be made out of the portion of the estate distributed or disposed of.

(3) In addition to being personally liable as provided in subsection (2), an executor, administrator or trustee who wilfully contravenes the provisions of subsection (1) is guilty of an offence and liable on summary conviction

(*a*) in the case of a natural person to a fine of not more than $1,000 and in default of payment to a term of imprisonment of not more than 60 days, and

(*b*) in the case of a corporation to a fine of not more than $5,000. [R.S.A. 1955, c. 109, s. 19]

Enforcement of order

20. An order made or direction given under this Act may be enforced in the same way and by the same means as any judgment, order or direction of the Court of Queen's Bench can be enforced, and a judge may make such interim order or direction as appears necessary

(*a*) to protect or preserve the assets of the estate, or

(*b*) to provide for the carrying on of the administration of the estate until the application has been finally disposed of. [R.S.A. 1955, c. 109, s. 20]

Certified copy of order filed with the clerk of the court

21. (1) A certified copy of every order made under this Act shall be filed with the clerk of the court out of which the letters probate or letters of administration issued.

(2) A memorandum of the order shall be endorsed on or annexed to the copy, in the custody of the clerk, of the original letters probate or letters of administration, as the case may be. [R.S.A. 1955, c. 109, s. 21]

Appeal

22. (1) An appeal lies to the Court of Appeal from any order made under this Act.

(2) The Court of Appeal upon such appeal may affirm, annul or vary the order in such manner as in its discretion it deems proper. [R.S.A. 1955, c. 109, s. 22]

The Dower Act

5. The benefits to which a spouse is entitled under the provisions of *The Dower Act* shall be taken into account by the judge when determining the provision that ought to be made for the spouse out of the estate.
[R.S.A. 1955, c. 109, s. 5]

[The Family Relief Act, R.S.A. 1970, c. 109]

Section 14. (1) An application for maintenance and support under this Act may be made in the matter of the estate of the deceased by originating notice under the Alberta Rules of Court.

(2) An application may be made
(a) by the trustee of the estate of a dependant 18 years of age or older on behalf of the dependant where the dependant is one for whose estate a trustee has been appointed by a court or designated by statute, and
(b) by a parent or by a guardian appointed by the court or by the Public Trustee, on behalf of an infant dependant.

(3) Where the dependant is an infant or the subject of an order under the Mentally Incapacitated Persons Act or a guardianship order, trusteeship order or a certificate of incapacity under The Dependent Adults Act, or a person for whose estate the Public Trustee is trustee, notice of any application in respect of an estate in which the dependant is interested shall be served on the Public Trustee and any other trustee, and the Public Trustee or any other trustee is entitled to appear and to be heard upon the application.

There are numerous cases upon the subject of the application, either by a spouse or by some other dependant.
Dependency should be established at the date of the application.
Foreseeability as at the Testator's death is not the test for support.
Also in Malychuk v Malychuk & Taschuk (1978) 6 Alta L.R. (2d) the Court did not base its findings on support during the life of the deceased extended to the dependent. The procedure is discussed in detail at page 242 of the judgment.
Randle v German (1976) 1 Alta L.R. (2d) 52 decided that an increased share for a widow should be borne rateably by the other beneficiaries: and that this should obtain unless one could show that a "reasonable testator" would have exempted his share from contribution. The judgment was pursuant to an appeal from an Order of a Chambers judge directing payment to the Widow of a lump sum out of the residue.

Matters for consideration by the Judge hearing the application are listed in the judgment in Re: Lawther [1947] 1 W.W.R. 577, a Manitoba decision often quoted in judgments under out Act; the list is useful for the preparation of affidavit in support of the application. It appears at page 586 of the report.

FATAL ACCIDENTS ACT, R.S.A. 1970, c. 138

Application for an Order appointing an Administrator Ad Litem of the estate of a deceased

Section 6 (2) Where neither probate of the will of [a deceased person] nor letters of administration of his estate have been granted in Alberta, a judge of the Court of Queen's Bench may, on the application of any party intending to bring or to continue an action under this section and on such terms and on such notice as the judge may direct, appoint an administrator ad litem of the estate of the deceased person, whereupon

(a) the administrator ad litem is an administrator against whom an action may be brought or continued [under ss 1] and by whom it may be defended,

(a.1) the administrator ad litem may take any steps that a defendant may take in an action, including third party proceedings and the bringing, by way of counterclaim, of any action that survives for the benefit of the estate of the deceased person, and ...

Semble where an action has been commenced the application would be brought as an interlocutory application in the action; however where no action exists Part 30 would appear to be indicated. No cases enlighten us on the point and the Statute is silent.

FIREFIGHTERS AND POLICEMEN LABOUR RELATIONS ACT, R.S.A. 1970 c. 143

Reference to a Judge of the Court of Queen's Bench by 'either party to the collective agreement' of any question as to the interpretation, application or alleged violation of the agreement re personal discipline, of a policeman.

Section 18(1) Notwithstanding section 17 (which provides for arbitration of differences in respect of a collective agreement between a municipality and the bargaining agent for its police) either party to the collective agreement may refer by notice of motion any question as to the

(a) interpretation, or
(b) application, or
(c) alleged violation

of the agreement in respect of personal discipline to a judge of the Court of Queen's Bench.

(2) The procedure in a reference shall be as determined by the judge.

(3) The judge upon the reference may (... ... ...)

[Firefighters and Policemen Labour Relations Act, R.S.A. 1970, c. 143]

(4) The judge by his decision shall not alter, ament or change the terms of the collective agreement.

(5) The decision . . . is binding on both parties and on all persons affected.

There are no cases reported. Semble, Part 30 would provide a more convenient vehicle than Notice of Motion, but the latter is prescribed.

THE FIRE PREVENTION ACT, R.S.A. 1970, c. 144

Appeal from an Order of the Fire Commissioner to alter, repair, remove or destroy premises, or to alter use or occupancy.

Section 24(3) If the party appealing is dissatisfied with the decision of the fire commissioner he may, within five days of service upon him of the decision, apply by petition to a judge of the Court of Queen's Bench to review the decision.

(4) The party appealing
  (a) shall file his petition with the clerk of the court, and
  (b) shall within five days of the filing, or within such extended time as the judge may allow, file with the clerk a bond
    (i) in an amount to be fixed by the judge, in no case less than one hundred dollars,
    (ii) with at least two sufficient sureties to be approved by the judge, and
    (iii) with the condition that, if he fails to sustain the appeal, he will pay all the costs thereon or such costs as may be awarded against him.

There are no cases reported. Appeal is by Petition and the Act is silent as to who shall be served.

THE FISH MARKETING ACT, R.S.A. 1970 c. 145

Appeal from an Order of the Minister determining compensation to the applicant for loss of use of his plant or equipment rendered redundant by the establishment of the Freshwater Fish Marketing Corporation.

Section 5 (3) Any person who believes himself aggrieved by a decision of the Minister made pursuant to ss (2) may, by originating notice of motion, appeal the Minister's decision to a Judge of the Court of Queen's Bench whose determination shall be binding on both parties.

THE GARAGEMEN'S LIEN ACT, R.S.A. 1970 c. 155

Application to extend the time for making a seizure under the Act.

Section 7(3) Notwithstanding 6(2) where it appears that a seizure can not be effected within the six months provided for in that subsection, a judge may, on ex parte application made during those six months, extend the time within which the seizure may be made for a further period not exceeding six months from the date of the order, and in that case the lien does not determine until the date so specified, if a certified copy of the Order is filed with the registration clerk prior to the expiration of the six months' period provided for in ss (2).

Ex Parte application, under Part 30, would be based on an affidavit filed. There are no cases reported on the application.

A case upon the application of the Act itself is General Motors Acceptance v Gorniak (1978) 6 Alta L.R. (2d) 285 but since this judgment was handed down pursuant to a regular action and not to a Motion, it is only of peripheral interest.

INDIVIDUAL RIGHTS PROTECTION ACT, S.A. 1972 c. 2

Appeal by the Attorney-General to the Court of Queen's Bench where a Board of Inquiry finds that a complaint is justified

Section 22 (3) The Attorney-General may, within 30 days after receiving the Commission's files and other records pursuant to ss (2), apply to the Court of Queen's Bench for an order under ss (5) by way of originating notice of motion filed in the office of the clerk of the court of the judicial district in which the inquiry of the board of inquiry was held.

(4) the judge hearing the motion shall hold an inquiry de novo and may confirm, reverse or vary the findings and recommendations of the board of inquiry and may make an order under ss(5).

(5) [gives the Judge wide discretionary powers to remedy the wrong done]

Appeal by the Complainant to the Court of Queen's Bench where a Board of Inquiry finds that a complaint is not justified: or by the Respondent against a finding that a complaint made of him was justified.

Section 23 (1) Where a board of inquiry finds a complaint not to be justified, the person who submitted the complaint may appeal therefrom to the Court of Queen's Bench in accordance with this section.

[Individual's Rights Protection Act, S. A. 1972 c. 2]

(2) Where a board of inquiry finds a complaint to be justified, in whole or in part, the person against whom the finding was made may appeal therefrom to the Court of Queen's Bench in accordance with this section.

(3) An appeal under this section shall be made by way of an originating notice of motion filed with the clerk of the court of the judicial district in which the inquiry was held.

(4) The originating notice of motion
- (a) shall be filed with the clerk of the court within 30 days of the date the appellant was furnished with a copy of the report of the board of inquiry;
- (b) shall be returnable on a date not later than 15 days after the date it is filed with the clerk;
- (c) shall show as a respondent the complainant or the person against whom the finding of the board of inquiry was made, as the case may be;
- (d) shall show the Commission as a nominal respondent for the purpose only of allowing the Commission to be notified of the motion and subsequent proceedings.

(5) The Court of Queen's Bench shall hear and determine the appeal by holding an inquiry de novo and may confirm, vary or reverse the findings and recommendations of the board of inquiry and make any order that may be made under s 22(5)

Section 24 (1) Where an order of the Court of Queen's Bench under Ss 22 or 23 did not direct a person to cease the contravention complained of, the Attorney General may subsequently apply by way of originating notice of motion to the Court of Queen's Bench for an order enjoining the person from continuing the contravention.
(2) The judge may, in his discretion, make the order and the order may be enforced in the same manner as any other Order of the Court of Queen's Bench.

Proceedings may be instituted against a Trade Union in its name and an officer of a Union or Employer's Association is deemed an Act of the Union or Association. (s. 25) The Commission is protected from giving evidence relative to information obtained for the purpose of the Act. Section 26 provides that proceedings shall not be invalid by reason of technical irregularity.

The Act requires all applications to be brought by Originating Notice of Motion. The Inquiries are de novo and, semble, the provisions of s. 20(2) apply to an Appeal hearing before the Court of Queen's Bench that is to say,

[Individual's Rights Protection Act, S.A. 1972, c. 2]

> ..[it] may receive and accept whatever evidence and information on oath, affidavit, or otherwise it, in its discretion, deems fit and proper, whether admissible as evidence in a court of law or not.

The procedure is not discussed in Schmidt v Calgary Bd of Education et al, the one case which is reported on the sections. The Trial Division judgment appears at [1974] 6 W.W.R. 279; the Appellate Division judgment at [1976] 6 W.W.R. 717; (1976) 72 D.L.R. (3d) 330 and (1976) 1 A.R. 286. Leave to appeal to the Supreme Court of Canada was denied (1977) 15 N.R. 267. The appeal was under Section 23.

THE INFANTS ACT, R.S.A. 1970, c. 185

Application for an Order permitting the sale or lease of an infant's land.

Section 2 (1) Where an infant is seized, possessed of or entitled to any real estate in fee or for a term of years, or otherwise, and the Court of Queen's Bench is of the opinion that a sale, lease or other disposition of the real estate, or of a part thereof, is necessary or proper for the maintenance or education of the infant or that for any cause the infant's interest requires or will be substantially promoted by such disposition, the Court

(a) may order the sale, or the letting for a term of years, or other disposition of the real estate, or any part thereof, to be made under the direction of the Court or one of its officers, or by the guardian of the infant, or by a person appointed for that purpose, in such manner and with such restrictions as are deemed expedient, and

(b) may order the infant to convey the estate.

(2) No sale, lease, or other disposition shall be made contrary to the provisions of a will or conveyance by which the estate has been devised or granted to the infant or devised and granted for his use.

(3) The Application shall be made in the name of the infant by his next friend or guardian ... but not without the consent of the infant if he is 14 or upwards unless the Court otherwise directs (paraphrased)

(4) [The Court may direct conveyance by others; i.e., a trustee]

(5) [Such a conveyance binds the infant]

(6) [The Court may direct disposition of moneys arising therefrom]

Section 8 provides that if an infant owns a reversionary interest in land, his guardian may consent to an assignment of a lease of the same, with the approval of the Court.

Application for an Order for maintenance out of a life estate.

Section 9. Where by a will or other instrument, property is given beneficially to any person for his life with a power of devising or appointing the property by will in favour of his children, or of one or more of them, the Court of Queen's Bench may, on the application, or with the consent, of the tenant for life, order that such portion of the proceeds of the property as it deems proper be applied towards the maintenance or education of any infant child in whose favour the power might be exercised, notwithstanding

(a) that there is a gift over in the event of there being no children to take under the power, or

(b) that there is a right conferred upon the tenant for life, or upon some other person in such event to make a disposition of the property in favour of some person other than the children.

[R.S.A. 1955, c. 158, s. 9]

Application for an Order directing that dividends in respect of stock, the property of an infant, be paid to the guardian of the infant for his benefit.

Section 10. (1) The Court of Queen's Bench

(a) by an order to be made on the application of the guardian of an infant

  (i) in whose name any stock or money by virtue of any statute for paying off any stock is standing, and

  (ii) who is beneficially entitled thereto, or

(b) if there is no guardian, by an order to be made in any action, cause or matter depending in the Court,

may direct all or any part of the dividends in respect of the stock or any such money to be paid to the guardian of the infant or to any other person for the maintenance and education, or otherwise for the benefit, of the infant.

(2), (3) and (4) elaborate on the Order: the guardian shall be named and his receipt becomes effectual: the Court may order costs to be paid and (4) provides that all banks and companies are indemnified for acts done pursuant to the Statute.

Application for an Order confirming a marriage settlement.

Section 11 (as amended in S.A. 1976, c. 82)

(1) Every female infant of the age of 17 years upon or in contemplation of her marriage may, with the sanction of the Court of

Queen's Bench, make a valid and binding settlement or contract for a settlement, of all or any part of her property over which she has a power of appointment, whether real or personal and whether in possession, reversion, remainder or expectancy.

(2) provides that the settlement is binding but (3) provides that if a power is expressly declared not to be exercised by an infant, (1) and (2) do not obtain.

Section 12 recites that the infant or his/her guardian may apply and where there is no guardian the Court may appoint one; the Court may also require any person who seems interested in the application, to be served with notice of it.

Section 14 provides that the practice and procedure on applications to the Court under this Act are governed by the Alberta Rules of Court.

This section would indicate that Part 30 should be used for applications under Sections 2(1), 9, 10, 11, for no form of application is prescribed.

Application for an Order confirming the settlement of an action in Tort committed against an infant.

Section 16. (1) Where an action is maintainable on behalf of an infant in respect of an injury to the infant and the guardian, parent or next friend of the infant acting on behalf of the infant has, either before or after the commencement of an action, agreed on a settlement of the claim or action with the person against whom the claim is made or action brought, the guardian, parent or next friend of the infant or the person against whom the claim or action is made or brought may, on ten days' notice to the opposite party and to the Public Trustee, apply, by originating notice or notice of motion, as the case may require, to a judge of the Court of Queen's Bench sitting in chambers, for an order confirming the settlement.

(2) Notwithstanding ss (1), where the amount agreed on as settlement of the claim or action is $1,000 or less the application may be brought before a judge of the surrogate court.

(3) Where on the application it appears to the judge that the settlement is in the best interests of the infant, the judge may confirm the settlement.

(4) Where a settlement is confirmed, the person against whom the claim is made or action brought is ipso facto discharged from all further claims arising out of or in respect of the injury to the infant.

[Infants Act, R.S.A. 1970 c. 185]

(5) On the application for a confirmation of a settlement, the judge may order that the money from the settlement be paid to the guardian where letters of guardianship have been issued, or to the Public Trustee under the Public Trustee Act.

The application is by Originating Notice where no action has been commenced and presumably the application may be brought as an interlocutory application in the Action by Notice of Motion where an action exists. In such case, presumably, a consent Order would be sought. The Affidavit would have to recite the cause of action and give medical reports as exhibits, if there is physical injury, with prognosis, and with the sworn opinion of the guardian that the settlement is in the best interests of the child. Counsel commonly speaks to the strength of the plaintiff's case and always the Public Trustee's consent to the settlement is requisite.

There are no cases reported on the application for confirmation of settlement insofar as the procedural aspect of the matter is concerned.

INSURANCE ACT, R.S.A. 1970, c. 187

Application to the Court for a declaration as to the sufficiency of evidence furnished in respect of a proof of claim under a Life contract.

Section 266. Where an insurer admits the validity of the insurance but does not admit the sufficiency of the evidence required by section 261 [death, or as the case may be, of insured, age of insured, name and age of beneficiary and right of claimant to be paid] and there is no other question in issue except [presumption of death], the insurer or the claimant may, before or after action is brought and upon at least 30 days' notice, apply to the court for a declaration as to the sufficiency of the evidence furnished, and the court may make the declaration or may direct what further evidence shall be furnished and on the furnishing thereof may make the declaration or, in special circumstances, may dispense with further evidence. [R.S.A. 1955 c.159 s. 268
[1960, c. 49, s.4]

Application to the Court for a declaration of presumption of death.

Section 267. Where a claimant alleges that the person whose life is insured should be presumed to be dead by reason of his not having been heard of for seven years, and there is no other question in issue except a question under section 266, the insurer or the claimant may, before or after action is brought and upon at least 30 days' notice, apply to the court for a declaration as to presumption of the death and the court may make the declaration.
[R.S.A. 1955, c. 159, s. 268; 1960, c. 49, s.4]

An appeal lies to the Court of Appeal [Section 270] from either of the above two applications.

The Court may, where it finds that the matters required by 266 are not proven or that the presumption under 267 is not established, direct ...

271. ... that the matters in issue be decided in an action brought or to be brought, or may make such other order as it deems just respecting further evidence to be furnished by the claimant, publication of advertisements, further inquiry or any other matter or respecting costs.
[R.S.A. 1955, c. 159, s. 268; 1960 c. 49, s.4]

There are no procedural directions in the Statute and semble application should be brought by invoking Part 30. However under the Marriage Act, R.S.A. 1970 c. 223, it is specifically directed that application should be brought by Petition, and the application is essentially the same.

[Insurance Act, R.S.A. 1970, c. 187]

Application for an Order for payment into Court of insurance proceeds

Section 272 Where an insurer admits liability for insurance money and it appears to the insurer that

(a) there are adverse claimants, or

(b) the whereabouts of a person entitled is unknown, or

(c) there is no person capable of giving and authorized to give a valid discharge therefor, who is willing to do so,

the insurer may, at any time after 30 days from the date of the happening of the event upon which the insurance money becomes payable, apply to the court ex parte for an order for payment of the money into court, and the court may, upon such notice, if any, as it thinks necessary make an order accordingly.

[R.S.A. 1955, c. 159, s. 274; 1960, c. 49, s. 4]

The application provided for is ex parte and the court may upon such application direct notice to be given. The procedure would be as set out in Part 30. Semble this is in practice the method followed. In Montreal Trust v Public Trustee [1975] 1 W.W.R. 280 such an application was made. The application was brought by Originating Notice and presumably upon the direction of the Judge the matter of the sufficiency of an altered designation of beneficiary was also decided upon the application. The contents of the Originating Notice and affidavits in support are set out at page 281 of the judgment in the W.W.R. The first application was made on June 24th, 1974; the second on the 13th of September 1974 for the distribution of the proceeds of insurance. No other cases are reported and the one herein mentioned is not reported upon the point of procedure but on the issue of the sufficiency of a designation under the Insurance Act: and it may be that the application was conceived under Rule 410(e).

Application for an Order permitting commutation of instalments of Insurance money.

Section 274. (2)

[Although where a contract of insurance provides for the payment of the proceeds by instalments the company may not, of its own motion or on the application of a beneficiary, pay out in a lump sum or in any other way]

A court may, upon the application of a beneficiary and upon at least 10 days' notice [presumably to the insurer] declare that in view of special circumstances

(a) the insurer may, with the consent of the beneficiary, commute instalments of insurance money, or

(b) the beneficiary may alienate or assign his interest in the insurance money.

There are no legislative directives as to procedure nor are there any cases reported.

It is interesting to note that instalments, in the hands of the insurer, are subject to an action to recover the value of necessaries supplied to the beneficiary or his infant children. No cases are reported and the procedure for bringing such an action is left to counsel's inventiveness. After the death of the beneficiary, however, one notes that his personal representative may have the payments commuted without an Order, (274(3)) if the insurer consents.

Application for an Order directing payment into Court of moneys held by insurer and payable under a Contract. (Cf. s. 261 which provides for evidence in support of claim)

Section 276 Where an insurer does not within 30 days after receipt of the evidence required by section 261 pay the insurance money to some person competent to receive it or into court, the court may, upon application of any person, order that the insurance money or any part thereof be paid into court, or may make such other order as to the distribution of the money as it deems just, and payment made in accordance with the order discharges the insurer to the extent of the amount paid.

[R.S.A. 1955, c. 159, s. 275; 1960, c. 49, s. 4]

Cf. notes at page 88 supra.

INTESTATE SUCCESSION ACT, R.S.A. 1970, c. 190

Application for an Order confirming the right of an illegitimate child to inherit from his/her father [application of child or personal representative]

Section 16 (1) Where a male person who is survived by illegitimate children dies intestate with respect to the whole or any part of his estate, and leaves no widow or lawful issue, if the Court of Queen's Bench or a judge thereof, on an application made by the executor, administrator or trustee or by a person claiming to be an illegitimate child, declares after due inquiry that

(a) the intestate has acknowledged the paternity of the illegitimate children, or

(b) the person has been declared to be the father by order made under any of the provisions of The Children of Unmarried Parents Act any Child Welfare Act or the Maintenance and

[Intestate Succession Act, R.S.A. 1970, c. 190]

Recovery Act,
the illegitimate children and their issue shall inherit from the person so dying the estate in respect of which there is an intestacy as if they were his legitimate children.
(2) For the purposes of this section, an intestate male person shall be deemed to have left no widow if she has left him and was at the time of his death living in adultery.
[R.S.A. 1955, c. 161, s. 16]

No cases; no legislative direction. Part 30.

INVESTMENT CONTRACTS ACT, R.S.A. 1970, c. 191

Appeal from a direction of the Alberta Securities Commission respecting the licensing of an issuer or salesman of investment contracts.

Section 21 (1) Where the Commission has reviewed a direction, decision, order or ruling pursuant to this Act, any person or company upon whom a notice is served under section 20 (respecting his or its registration) or any other person or company who is primarily affected by such direction, decision, order or ruling or by the order made upon the review may appeal to the Court of Appeal of Alberta.

(2) Every appeal shall be by notice of motion served upon the Registrar within 30 days after the mailing of the notice under section 20 and the practice and procedure upon and in relation to the appeal shall be the same as upon an appeal from a judgment of a judge of the Court of Queen's Bench in an action, but the Lieutenant-Governor in Council may vary or amend such practice and procedure or may prescribe the practice and procedure that shall be applicable to appeals taken under this section.

(3) The Registrar (of the Securities Commission) shall certify to the Registrar of the Court of Appeal
- (a) the direction, decision, order or ruling that has been reviewed by the Commission,
- (b) the order of the Commission upon the review, together with any statement of reasons therefor,
- (c) the record of the review, and
- (d) all written submissions to the Commission or other material that in the opinion of the Registrar are relevant to the appeal.

[There are two registrars: presumably the Registrar mentioned in (d) is the Registrar of the Securities Commission]

Note the provisions of Section 18(2) in respect of evidence.

[Investment Contracts Act, R.S.A. 1970, c. 191]

The Statute provides that the Commission is not bound by the rules of evidence and so the Court of Appeal will similarly not be bound by those rules.

IRRIGATION ACT, R.S.A. 1970 c. 192

Application for a declaration that a director never was, or has ceased to be, qualified to be a director

Section 35 (1) A water user or, subject to section 34, a board, may apply to the Court of Queen's Bench by way of originating notice of motion for a declaration that a director never was or has ceased to be qualified as a director.

(2) Upon hearing the application and the evidence adduced before him the judge

(a) may, by order, declare the director to be disqualified, or

(b) refuse the order,

with or without costs.

(3) Where a judge declares a director to be disqualified, his seat on the board becomes vacant.

[The remainder of the section, (4) to (8), provides for matters consequential upon the above: repayment of improper gains, and the barring of the director from the Board for 5 years thereafter]

The Statute provides that an application by the Board shall be upon 30 days' notice. The notice is not specified where the application is by a water user. (See s. 34).
There are no cases reported.

ALBERTA LABOUR ACT, R.S.A. 1970 c. 196
Repealed and replaced by S.A. 1973, c. 33

Note that the jurisdiction of the Court has been ousted by the new Act. There remains a directive that an application for an interim injunction in the case of a strike or a lockout shall not be granted ex parte. (Section 131)

THE LAND SURVEYORS ACT, R.S.A. 1970 c. 197

Appeal from a finding of guilty of conduct unbecoming an Alberta Land Surveyor.

Section 50 (1) A member who has been found guilty of conduct unbecoming an Alberta land surveyor may appeal to the Court of

[The Land Surveyors Act, R.S.A. 1970 c. 197]

Queen's Bench by originating notice of motion
(a) from the finding of guilt, or
(b) if an order has been made against him under s. 38(1)
from the finding of guilt and the order or from the order only.

The Appeal provisions are unusual: they provide that the Judge may receive the evidence which was before the council and, in addition, any other evidence, oral or by affidavit and may direct a trial for the resolution of any issues arising out of the appeal. Nothing in the statute directs the Court hearing the trial as to whether affidavit evidence will be receivable at such trial or whether the issue will be determined in the usual manner of the Court. There would not seem to be any cases reported and the Statute does not consider the question, though Section 46(5) absolves the Committee, in the hearing before it, of consideration of the Rules of evidence and 46(6) makes the accused compellable.

THE LAND TITLES ACT, R.S.A. 1970 c. 198 as amended

GENERALLY, the Land Titles Act provides for certain procedural matters:

NOTICE: notwithstanding anything in the Act a Judge may direct that notice be served upon any person and the manner of giving such notice (Section 189) in respect of any application under the Act.

APPEAL to the Court of Appeal (Section 191) and provision is made for reference to the Court of Appeal by the Judge hearing any application (Section 192).

COSTS are in the discretion of the judge (s. 193).

Application by owner to bring land under the operation of the Land Titles Act. Where a question of interest in land arises, the Registrar refers the matter to a judge of the Court of Queen's Bench, who also hears representations as to any adverse claims. (ss. 39 and 41)

Section 39. In all cases other than those provided for in section 38 [Where there is no question as to the title or the equitable interest of the applicant] the Registrar shall forthwith, having given the applicant a certificate of the filing of his application [see Form 7, Schedule A] transmit the application, with all evidence supplied, to a judge to be dealt with as hereinafter mentioned.
[R.S.A. 1955, c. 170, s. 40]

- the Court shall immediately consider the application (s. 40)
- adverse claimants advance their claims under (s. 41)
- judge may direct notice of application in the press (s. 42)
- nothing in the Statute provides for the manner of the hearing, though the provisions of s. 40 would give the Court complete latitude in respect of the proceedings.

Section 41 Any person having an adverse claim or a claim not recognized in the application for registration may at any time before the judge has approved of the applicant's title file with the Registrar a short statement of his claim, verified by affidavit, and shall serve a copy thereof on the applicant, his solicitor or agent.

42. If any adverse claim is filed the judge shall proceed to examine into and adjudicate thereon and no certificate of title shall be granted until the adverse claim has been disposed of.

Application for an Order permitting registration of a copy of an instrument, the original being filed in the other Land Titles Office.

Section 59. - In case any instrument is registered in the Land Titles Office of one registration district a judge of the Court of Queen's Bench may order that a certified copy of the instrument be filed

[The Land Titles Act, R.S.A. 1970 c. 198 as amended]

in the Land Titles Office of any other registration district, and the filing of a copy together with the order has the same effect as the registration of the original instrument.
[R.S.A. 1955, c. 170, s. 59]

Application for a certificate that moneys due in respect of a mortgage or encumbrance are paid and no taxes in respect thereof are due to the Crown in the right of Alberta: which certificate operates when registered as a discharge of the Mortgage at Land Titles.

Section 110 (1) (b)
[The Registrar shall discharge a mortgage registered at Land Titles Office]
upon the production of a certificate signed by a judge certifying that the judge is satisfied of the payment of all or part of the moneys secured by the mortgage or encumbrance, and that the mortgagee or encumbrancee is living, or if dead, that no succession duty or other tax is payable to the Crown in the right of the Province with respect to the said mortgage or encumbrance;

Application for a certificate to the effect that the right of the Mortgagee to payment of the sums secured by the mortgage has been extinguished by reason of the operation of the Limitation of Actions Act

Section 110(1) (c)
[The Registrar shall discharge a mortgage registered at Land Titles Office]
upon the production of a certificate signed by a judge certifying that the right of any person to recover any money secured by the mortgage or encumbrance has been extinguished by reason of the operation of the provisions of the Limitation of Actions Act.

Application for an Order directing a memorandum of satisfaction of annuity registered against a title to land.

Section 111 Upon proof of the death of the annuitant, or of the occurrence of the event or circumstance upon which in accordance with the provisions of any encumbrance the annuity or sum of money thereby secured ceases to be payable, and upon proof that all arrears of the said annuity and interest or money have been paid, satisfied, or discharged, the Registrar shall, upon the order of a judge, make a memorandum upon the certificate of title in the register that the annuity or sum of money is satisfied and discharged and shall cancel the instrument....

[The Land Titles Act, R.S.A. 1970, c. 198 as amended]

Application for an Order, where a receipt for payment of the balance on a mortgage cannot be given, directing payment in to a chartered bank.

Section 113 (1) When any mortgagor becomes entitled to pay off the mortgage moneys and the registered mortgagee is absent from the province and there is no person authorized by registered power of attorney to give a receipt to the mortgagor for the mortgage moneys after the date appointed for the redemption of any mortgage, a judge may, on application to him and proof of the facts and of the amount due for principal and interest upon the mortgage, direct the payment into a chartered bank having a branch or agency in the district, or if not in the district in the Province, of the mortgage moneys, with all arrears of interest then due thereon, to the credit of the mortgagee or other person entitled thereto, and thereupon the interest upon the mortgage ceases to run or accrue.

(3) [Upon presentation to him of the Judge's Order and the Bank receipt for the balance, the Registrar shall enter the Order and interest upon the mortgage shall cease to run and the mortgage shall be discharged] [paraphrased]

Application for an Order, where a dispute arises as to the balance due on a mortgage, establishing the balance and directing payment into a chartered bank.

Section 113 (2) When any mortgagor becomes entitled to pay off the mortgage moneys and a dispute arises between the mortgagee or other person entitled to receive the mortgage moneys as to the amount payable in satisfaction of the mortgage, the judge may, on the application of either party and upon the giving of such notice to such persons as the judge may direct, after hearing evidence in such manner as he may direct, deal with the matter in a summary manner and by order fix the amount payable as at the date to be mentioned in the order and direct the payment of that amount into a chartered bank having a branch or agency in the district in which the land comprised in the mortgage is situated, together with any interest accrued thereon since the date so fixed to the date of payment, to the credit of the mortgagee or other person entitled thereto, and thereupon the interest on the mortgage ceases to run or accrue.

(3) [Upon filing the Order and the receipt of the Chartered Bank, the Mortgage is discharged and interest ceases to run] (paraphrased).

[The Land Titles Act, R.S.A. 1970, c. 198 as amended]

Application to have the trustee removed and another appointed, where land is held for a beneficiary.

Section 125. (1) [The Trustee of land holding by virtue of Administration or Probate holds subject to the equities, but for the purpose of dealing with the land he is deemed to be the owner] [paraphrased]

(2) Any person beneficially interested in any such land may apply to a court or judge having jurisdiction to have it taken out of the hands of the trustee having by law charge of the land and to have it transferred to some other person or persons and the court or judge, upon reasonable cause being shown, shall name some suitable person or persons as owner of the land, and upon the person or persons named accepting the ownership and giving approved security for the due fulfilment of the trusts, the court or a judge may order the Registrar to cancel the certificate of title to the trustee, and to grant a new certificate of title to the person or persons named.

Cases: Ogilvie-Five Roses Ltd v Hawkins et al, 4 E.T.R. 163 while not decided on this section, deals with the question: when does the beneficial interest of an heir in an intestacy, arise? Held in this case that the heir did not as against the administratrix of the estate have any interest in the lands of the deceased and as against the administratrix the only right he had was to force the administratrix to administer the estate.

Semble, therefore, that in order to come under section 125 it might be necessary first to establish not only that the applicant was a beneficiary of the estate but that he had a beneficial interest in the land itself, at the time of the bringing of the application.

Application for an Order authorizing a transfer, mortgage or other instrument by a personal representative notwithstanding that there are infants interested and there is no consent filed by the Public Trustee

Section 126. The Registrar [of Land Titles] shall register no transfer, mortgage or other instrument executed by an executor, administrator or trustee under a Will where infants are interested unless the Public Trustee consents or

the instrument to be registered is accompanied by an order of a judge of competent jurisdiction, authorizing the proposed dealing.

[The Land Titles Act, R.S.A. 1970, c. 198 as amended]

Application for an Order directing discharge of a Writ of Execution against land so that the land may be dealt with free of the Writ.

Section 129 ... Upon the delivery to the Registrar ... of a judge's order, showing the expiration, satisfaction or withdrawal of the writ as against the whole or any portion of the land so bound .. [the land shall be released from the Writ]

The cases: the application is thoroughly discussed in Palmer v Southwood[1976] 3 W.W.R. 556, as to the substantive law; there is also an older case which discusses the rights of writ-holders as opposed to the rights of an assignee from the vendor in the context of a Sheriff's interpleader: an admirable judgment reported at [1924] 2 W.W.R. 529.

Since the Statute does not prescribe the pleading, semble Part 30 is indicated.

Application for an Order confirming the sale of land [or of an interest in land] under process of law. In connection with such Order, application for an Order extending the time for registration of the transfer under such a sale, for without such order after 2 months the sale is void.

Section 131 [paraphrased in part] No sale by a sheriff under process of law of land or an interest in land is of any effect until it has been confirmed by the Court or a judge. The Transfer and the Order shall be delivered to the Registrar who, after the expiration of 4 weeks, shall register it ...

Section 132. Registration shall take place within 2 months after the date of the Order of confirmation, or the sale is void.

Section 133. Application may be made by the Sheriff or 'any person' on notice to the owner unless notice is dispensed with by the Court.

The procedure is not spelled out and presumably Part 30 will obtain. The case of Morguard Mortgage Investments Ltd v Faro Development Corporation Ltd [1975] 1 W.W.R. 737, in the Alberta Appellate Division, decides that where a transfer has been approved and confirmed pursuant to Section 133 of the Land Titles Act, the equity of redemption is extinguished and the process is irreversible. The case does state, however, that there remains an equity of redemption where land has been taken over by a Mortgagee pursuant to an absolute Order of Foreclosure.

A motion to quash the Notice of Appeal to the Supreme Court of Canada was granted.

On equity of redemption cf. the judgment in Triple Five Corp'n v Eaton's (1977) 4 A.R. 222.

[The Land Titles Act, R.S.A. 1970, c. 198 as amended]

Application for an Order shortening the time for taking proceedings on a Caveat

Section 144(2) Notwithstanding (1) [which provides that a Caveat lapses 60 days after a Notice to Take Proceedings is served], the Court or a Judge may upon an ex parte application shorten the period of 60 days to such period as it or he specifies in the order, and a copy of the order shall be served or mailed with the notice in this section referred to.

There are no cases. Part 30 is indicated.

Application for an Order extending the time for proceeding on a Caveat.

Section 145 Upon application to be made by way of notice of motion to a judge at any time before the expiration of the time limited for proceeding upon a caveat, the judge for sufficient cause shown and subject to such conditions as may seem proper, may extend the time for proceeding upon the caveat for a further period to be specified in the order made upon application.

There are no cases. A simple notice of motion, however, is permitted by the Statute: indeed, the notice of motion is prescribed by the Statute, doubtless because of the feature providing for two days' notice.

It is surprising that Form 36, (Section 144) of the Land Titles Act does not provide for an address for service of the person giving the notice being necessarily included in the Notice to Caveator.

Application by 'applicant or owner' calling upon the Caveator to show cause why his caveat should not be discharged. (Section 146(1))
Application by 'applicant or owner' calling upon the Registrar to withdraw a caveat filed by him.(Section 151)

Section 146. (1) In the case of a caveat filed, except a caveat filed by the Registrar as hereinafter provided, the applicant or owner may at any time apply to the court or a judge, by originating notice subject to the Alberta Rules of Court, calling upon the Caveator to show cause why his caveat should not be discharged, and upon hearing the application the court or judge may make such order in the premises and as to costs as to the court or judge may seem just.

The cases on this section refer without exception to what is, and what is not, an interest in land. See page 99 infra.

Section 151. In the case of a caveat filed by the Registrar as hereinafter provided, the applicant or owner may apply to the Court or

[The Land Titles Act, R.S.A. 1970, c. 198 as amended]

> a judge by originating notice as provided for by the Alberta Rules of Court to be served upon the person on whose behalf the caveat has been filed for an order that the caveat be withdrawn or discharged, ... [and the section provides for service on the Public Trustee where appropriate]
>
> ... and the court may make such order in the premises, either dismissing the application, discharging or withdrawing the caveat, or directing any of the parties to commence proceedings by action or otherwise as to the court or judge may seem just and proper.

There are no cases on the procedure but it is noted that Re Lowden, an application for the removal of a Registrar's Caveat based upon a reservation on a title of minerals which reservation had its roots in a conveyancing error, was brought by Petition. See (1978) 14 A.R. 265. The case is in the Trial Division of the Alberta Supreme Court and the Court ordered the Caveat expunged.

The cases on Caveats, as mentioned supra, concern the nature of an interest in land upon which a Caveat may be based. Vanguard v Vermont [1977] 2 W.W.R. 66 (see particularly the judgment of Moore, J. at page 74) underlines that a Caveat does not create an interest in land: it merely warns of one and even though an Agreement may purport to permit the filing of a Caveat it is ineffective to change the nature of the Caveator's right.

To the same effect, the character of an interest in land (here a profit a prendre) is not altered by the terminology of the agreement and the use of the word 'transfer' rather than the usual 'grant' and the Caveat based on the profit a prendre was restored. Siewert v Seward [1975] 3 W.W.R. 584.

Semble, the principal reason for having a Caveat discharged (besides the principal one of its being wrongly filed) is that the nature of the right sought to be protected does not constitute an interest in land.

Application for a certificate of payment of the moneys due under an equitable mortgage or encumbrance registered at Land Titles Office by way of Caveat, and that no taxes in relation to the said mortgage or encumbrance are payable to the Crown in the right of Alberta.

Section 146. (2) Where a caveat has been filed with the Registrar pursuant to section 136, and the caveat is based upon an unregistered mortgage or encumbrance, the Registrar shall cancel the memorandum thereof upon the certificate of title of the land affected by the caveat upon the production of a certificate sighed by a judge certifying that the judge is satisfied of the payment of all the moneys secured by the mortgage or encumbrance and that the mortgagee or encumbrancee is living, or if dead, that

[The Land Titles Act, R.S.A. 1970, c. 198 as amended]

no succession duty or other tax is payable to the Crown in right of Alberta with respect to the said mortgage or encumbrance, or upon the production of a certificate signed by a judge certifying that all obligations, the performance of which has been secured by the mortgage or encumbrance, have been duly performed and have come to an end.
[R.S.A. 1955, c. 170, s. 146]
See also section 147 (Judge may order security)

Application for an Order permitting the filing of a new Caveat notwithstanding a previous filing in the same matter.

Section 150. Except as hereinafter mentioned, no one shall file more than one caveat in respect of the same matter, but nothing herein contained prejudices the right of the Registrar to enter any caveat under the powers vested in him by this Act, and a judge may, if he thinks proper upon application made to him for that purpose and upon such terms as to costs or otherwise as he may consider just, order that a new caveat may be filed, and such order shall fix a time within which the caveator must proceed upon the caveat.
[R.S.A. 1955, c. 170, s. 150] [See also Section 147 re security]

A similar application exists under the Administration of Estates Act, but the procedure there is also not well defined. The Rules would indicate that the applicant would be free to use Part 30.

Application for a fiat authorizing the registration of an instrument notwithstanding defective proof of its execution.

Section 159 (2) Upon being satisfied of the due execution of any instrument the court or judge may, whether the instrument has been executed within or without the limits of the Province, authorize its registration, notwithstanding that the proof of the execution may be defective under the provisions of this section or of section 158.
[the attestation of instruments is prescribed in ss. 158 and 159(1)]

It is almost certain that the evidence adduced in support of this application will not be technically admissible and the Act does not deal with this aspect of proof. It may be that the framers had such a factor in mind when they worded the section 'upon being satisfied' and what is necessary is that the judge be satisfied of execution: not that execution be proved.

Unfortunately there are no cases reported, either upon the application or upon the result where a conveyance so proved subsequently is shown to be spurious.

[The Land Titles Act, R.S.A. 1970, c. 198, as amended]

Appeal from any decision of the Registrar

Section 181 (1) If any person is dissatisfied with any act, omission, refusal, decision, direction or order of a Registrar, that person may require the Registrar to set forth, in writing under his hand, the ground of the act, omission, refusal, decision, direction or order, and may then apply to a judge of the Court of Queen's Bench by petition, setting forth the grounds of his dissatisfaction.

(2) The judge, having caused the Registrar to be served with a copy of the petition, has jurisdiction to hear the petition and to make such order in the premises and as to the costs of the parties appearing upon the petition as the circumstances of the case require. [1955, c. 170, s. 181]

To some degree this application would appear to be co-extensive with one under Section 151 for removal of a Registrar's Caveat and perhaps this is why the application in Re: Lowden (1978) 14 A.R. 265, was launched by Petition. Under Section 151 the prescribed form is Originating Notice.

The cases, none of which are directly related to the procedural aspect of the application, are

Pfleuger & Einnarson v the Registrar, S.A.L.R.D., Amoco & Shell (1977) 2 Alta L.R. (2d) 398 which case is interesting procedurally in that it holds that a surface lease is not an encumbrance nor a charge on land, although the owner thereof is an 'owner' within the definition of that term. The Oil companies therefore did not have to consent to the filing at the Land Titles Office of a plan of subdivision and the Court so held.

Milk River v McCombs [1978] 4 W.W.R. 614 was an application to settle the question of ownership of a portion of a river bed. The application might have been brought under 410(c)(1).

Application for relief where the applicant has mistakenly improved land not his own.

Section 183. (1) Where a person at any time has made lasting improvements on land under the belief that the land was his own, he or his assigns

(a) are entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by the improvements

or

(b) are entitled to or may be required to retain the land if the court is of opinion or requires that this should be done having regard to what is just under all the circumstances of the case.

(2) The person entitled or required to retain the land shall pay such compensation as the court may direct.
[R.S.A. 1955, c. 170, s. 183]

A complete brief on the application and on those considerations which the Court will have in view is contained in a judgment reported in Maly v Ukrainian Catholic (1977) 1 Alta L.R. (2d) 277 which judgment also raises some pertinent peripheral issues such as the fact that the plaintiff was (albeit innocently) a trespasser. The authorities are set out in the judgment and in an application under the section consideration of the Maly case would be de rigeur.

See also Canada Permanent v Herron [1976] W.W.D. 62 in which the applicant was not successful under the Statute but did obtain title by virtue of the Limitation of Actions Act as an Adverse Possessor.

Application for an Order cancelling Certificate of Title where the owner is dead or missing and issuing a new title to the applicant.

Section 188 (1) In any proceeding respecting land ... the judge by decree or order may direct the registrar to cancel ... or issue .. any duplicate certificate, or make any memorandum or entry thereon ...

(2) In particular and without limiting the generality of the foregoing, in any case where a title to land has been issued and the owner has entered into any contract relating to the sale or disposition thereof and where it can be shown to the satisfaction of the judge that

(a) the applicant is entitled to a transfer of the land and to be registered as owner thereof, and that the registered owner has no further interest in the land, and

(b) the registered owner is dead and no transfer of the land to the purchaser has been made, or the registered owner has not been located after a reasonable inquiry and no transfer of land to the purchaser has been made,

the judge upon the giving of such notice to such persons as he may require, may by order direct the Registrar to cancel the existing certificate of title and issue a new certificate of title in the name of the purchaser.
[R.S.A. 1955, c. 170, s. 188]

Re: Finley and Sharp (1977) 4 Alta L.R. (2d) 47; (1977) 4 A.R. 26 warns that the section does not empower a court to direct the Registrar to issue a new certificate of title free and clear of executions registered against a vendor where the vendor voluntarily entered into the agreement for sale. Section 128 expressly provides that the land is bound and that no transfer executed by the registered owner shall be registered except subject to the execution.

There are no reported cases on the procedure which would seem to be governed by the provisions of the Rules of Court.

Application for Security for Costs against out-of-province encumbrancer.

Section 190 (6) Whenever any proceeding is taken under this Act, whether by motion or summons, or by the filing with or the delivery to the Registrar of a caveat, builders' lien, or copy of an execution against lands, or other proceeding, and any party to the proceeding, or the person in whose behalf of against whose interest the caveat, lien or execution has been filed or delivered is not a resident of the Province, a judge may upon the application of a party to the proceeding or of anyone interested therein or affected by the caveat, lien or execution, grant an order requiring the non-resident to give security for the costs of the applicant for the order in prosecuting or resisting the proceedings or in removing or maintaining the caveat, lien or execution, and it may be a term of the order that in default the proceeding may be deemed granted or dismissed, or the caveat, lien or execution may be deemed removed or maintained, and the order may also provide for a stay of proceedings.

(7) The practice and procedure for obtaining the order and giving the security shall be as nearly as may be the same as upon an application for security for costs in civil causes in the Court of Queen's Bench or such other court as hereinbefore mentioned, and the judge may direct payment of the costs incident to the application or order to be taxed and recovered as is provided in the case of the costs mentioned in (5) of this section.

There are no reported cases. The Statute refers to the procedure in the Rules of Court, [i.e., Rules 594 to 599] but the procedure in the Rules is interlocutory, of necessity, and the above section provides for the right to security in many instances in which no action has been commenced in the courts. Where, for example, a Caveat is filed at the instance of an out-of-province Caveator, semble the application for security would come before the Notice to Take Proceedings on Caveat. The question is simply raised, and not dealt with, for there would not seem to be a recorded answer.

[The Land Titles Act, R.S.A. 1970, c. 198 as amended]

Application for an Order authorizing dealing with land by a joint trustee notwithstanding the failure of execution by all of the trustees registered.

Transfers to trustees and joint owners

205. (1) Upon the transfer of any land for which a certificate of title has been granted to two or more persons as joint owners, to be held by them as trustees, the transferor may insert in the transfer or other instrument, the words "no survivorship" and the Registrar shall in that case include the words in the duplicate certificate issued to the joint owners pursuant to the transfer and in the certificate of title.

(2) Any two or more persons registered as joint owners of any land held by them as trustees may by writing under their hand authorize the Registrar to enter the words "no survivorship" upon the duplicate certificate and also upon the certificate of title.

(3) After the entry of the words "no survivorship" has been made and signed by the Registrar in either case as aforesaid it is not lawful for any less number of joint owners than the number entered to transfer or otherwise deal with the land without obtaining the sanction of the court or of a judge. [R.S.A. 1955, c. 170, s. 205]

Notice of court order

206. Before making any order as aforesaid the court or judge shall, if it seems requisite, cause notice of intention to do so to be properly advertised, and appoint a period of time within which any person interested may show cause why the order should not be made, and thereupon the court or judge may order the transfer of the land to any new owner or owners, solely or jointly with or in the place of any existing owner or owners, or may make such order in the premises as the court or a judge thinks just for the protection of the persons beneficially interested in the land or in the proceeds thereof, and upon the order being deposited with the Registrar he shall make a memorandum thereof upon the certificate of title and upon the duplicate certificate when it is produced to him, and upon the memorandum being made the person or persons named in the order shall be the owner or owners of the land.

[R.S.A. 1955, c. 170, s. 206]

Jurisdiction of courts

207. Nothing in this Act takes away or affects the jurisdiction of any competent court on the ground of actual fraud or over contracts for the sale or other disposition of land for which a certificate of title has been granted. [R.S.A. 1955, c. 170, s. 207]

Effect of death, etc., upon proceedings under Act

208. Proceedings under this Act do not abate nor shall they be suspended by any death, transmission or change of interest, but in any such event a judge may make such order for carrying on, discontinuing or suspending the proceedings, upon the application of any person interested, as under the circumstances he thinks just, and may for such purpose require the production of such evidence and such notices to be given as he thinks necessary. [R.S.A. 1955, c. 170, s. 208]

[The Land Titles Act, R.S.A. 1970, c. 198 as amended]

There are no cases and in the Act no procedure prescribed. It would seem to fall under Part 30: chiefly because the Court is empowered to provide for notice to such persons as it shall direct.

THE LANDLORD AND TENANT ACT, S.A. 1978 c. 65

Application by a landlord for an Order for possession of premises against an overholding tenant.

Section 11(1) If a tenant after his tenancy has expired or terminated does not vacate the premises held by him, the landlord may apply to a court for an order for possession.

Jurisdiction - Court of Queen's Bench, and no reference to chambers.
Originating Document: originating Notice, mandatory by s. 47 of the Act.
Applicant is "the landlord": not defined in the Act and Cf. p. as to the status of an assignee of the landlord to bring an application for possession, invoking the summary procedure.

Respondent is the overholding tenant: termination of the tenancy is prescribed by Ss. 4-8 incl. and the contents of the written notice to be served on the tenant are prescribed in S. 8.

The Notice of the application is prescribed: three clear days. (Act, s. 11(2))
Evidence to be adduced in support of the application is prescribed by the Act (s. 12) and see the Temporary Rent Regulations Measures Act and the Rent Decontrol Act.

Bessemer, Master, in his judgment in Hanson v Hamid reported at 2 A.R. 77 makes the point that the Originating Notice issued pursuant to the Act must have "at the foot or end thereof, or bear endorsed thereon, a Notice to the Respondents in conformance with Rules 88(e) and 89 of the Supreme Court Rules. The Master, upon that ground and upon the ground that the Notice given was less than three clear days, the application was refused. The Master quotes Laycraft, J., in Regina v Staiger, 2 A.R. 427, where he says that 'at least' imports clear days and the day of occurrence of each event is excluded from the computation.

Application by a Landlord to recover rent and damages where a Tenant has repudiated the tenancy and the Landlord elects not to accept the repudiation and to continue the tenancy.

Section 22 If a tenant by abandonment of the premises gives the landlord

reasonable grounds to believe that the tenant has repudiated the tenancy the landlord may ...
(b) refuse to accept the repudiation and
(3) apply to the Court of Queen's Bench for enforcement of the residential tenancy agreement, but shall take reasonable steps to mitigate his damages. See in this connection (4).

The application is by Originating Notice (Section 47) but it would appear that the full time prescribed by the Rules will be requisite in respect of Notice, for no provision is made for the shorter time provided for elsewhere in the Act.

Application by a Landlord upon a substantial breach of his terms of tenancy by the Tenant - other than a failure to pay rent:
- for termination of the tenancy
- for damages
- for possession.

Section 24 (2) If a tenant commits a substantial breach [other than a failure to pay rent: and substantial breach is defined in section 24(1), (a) to (f) both inclusive], upon at least 3 days' notice, exclusive of Sundays and Holidays or such shorter notice as a Court may approve, the landlord may apply for an order:
- that the residential tenancy is terminated(s. 24(7))
- award damages, if any, resulting from the substantial breach (s. 24(7)(a))
- give an order for possession. (S. 24(7)(b)).

The section provides for the procedure and requires careful perusal. A substantial breach consisting of failure to pay rent may, however, be cured within 14 days (s. 24(4)) and the section effectively provides for 14 days' grace. Also the Landlord cannot, on failure of the tenant to pay rent, arbitrarily terminate the tenancy, if the tenant serves him in writing with a Notice of Objection stating his reasons. In such an event the Landlord must apply to the Court on 3 days or less as the Court may order, for an Order terminating the tenancy.

Section 24(6) and (7)

(6) If the tenant serves a notice of objection ... the notice of termination ... is ineffective to terminate the tenancy, but the landlord may, upon at least 3 days' notice ... apply to the court for an order declaring that the residential tenancy agreement is terminated.
(7) upon an application by a landlord ...
a Court may award damages or give an order for possession.

[The Landlord and Tenant Act, S.A. 1978, c. 65]

These two applications (Sec. 24(2) and Sec 24(6)and(7)) may be brought upon 3 clear days' notice or 'such shorter time as a judge may direct', by Originating Notice (Sec 47).

Application by Tenant for damages, abatement of rent, compensation and/or termination of the tenancy upon the Landlord's default.

Section 21 (1) If a landlord breaches a residential tenancy agreement or contravenes this Act, the tenant may apply to a court for one or more of the following remedies;

(a) damages suffered by reason of the breach or contravention;
(b) abatement of rent to the extent that the breach or contravention deprives the tenant of the benefit of the residential tenancy agreement;
(c) compensation for the cost of making good the landlord's default;
(d) termination of the tenancy.

Upon the application (which by s. 47 is to be brought by Originating Notice) the Judge may grant the Order or, in a proper case, direct payment of rental moneys into Court. (21(2)).

Notice presumably must be 10 days: although the Court could presumably, if there were a reason, shorten the time. This is not provided for either in the Statute or in Rule 406 and would have to be applied for under the general provisions of Rule 548.

There are no cases reported, either on the procedure or upon the substantive law.

Relevant to this application: to any application for enforcement or termination of tenancy, however, are the cases under Applications for Possession of Land dealt with herein at page

THE LANDMEN LICENSING ACT, R.S.A. 1970, c. 202.

Appeal from the decision of an investigating committee (see s. 15) either by the Landman or the Complainant.

Section 21 Either party aggrieved by a decision of the committee or the chairman (of the investigating committee appointed under s. 15) may, within 60 days of the date on which the decision is served upon him, by leave of a judge thereof, appeal to the Court of Queen's Bench. [1968, c. 53, s. 21; 1978, c. 51, s. 31]

No cases are reported. No procedure is prescribed.

LEGAL PROFESSION ACT, R.S.A. 1970, c. 203

Appeal from a finding of conduct unbecoming a Barrister: from the finding or from the punishment imposed.

Section 70 (1) Where a member has been found guilty of conduct unbecoming a barrister and solicitor, the member may appeal to the Court of Appeal from the finding of guilt or the order of punishment or both.
[Proceedings before the Benchers are set out in ss 66 to 68, and proceedings before the Discipline Committee in ss 47 to 65]

(2) The appeal shall be commenced
- (a) by filing a notice of appeal with the Registrar of the Court at Edmonton or Calgary and
- (b) by serving a copy of the notice of appeal upon the Secretary,

both within thirty days from the date on which the finding and the order of punishment, if any, is made by the Benchers.

There is no provision for further evidence to be adduced during the course of the Appeal and

71 (1) the Appeal shall be founded upon a copy of the report of the investigating committee, a copy of the record, a copy of the finding and order, if any, of the Benchers and a copy of the evidence, if any, received by the Benchers, all of which shall be certified by the Secretary.

(3) the procedure in an appeal shall, with the necessary changes, be the same as that provided in the Alberta Rules of Court for appeals from a judgment of a judge of the Court of Queen's Bench to the Court of Appeal.

No cases are reported in respect of the procedure.
The procedure under this Act, however, differs rather markedly from other Professional appeals.

THE LIBRARIES ACT, R.S.A. 1970 c. 206

The Act provides for two applications to the Court of Queen's Bench both ex parte, for Orders declaring Library Boards dissolved. The applications are launched by a Municipal Council or by the Minister and it would seem that the reason for these applications is administrative only.

THE LOCAL AUTHORITIES BOARD ACT, R.S.A. 1970, c. 218

This Act sets up a forum distinct from but equal in power to the Court of Queen's Bench: appeals are to the Court of Appeal by leave.

[The Local Authorities Board Act, R.S.A. 1970, c. 218]

The jurisdiction of the Board is dealt with in some detail in The Town of Cochrane v Local Authorities Board [1976] 1 W.W.R. 637, a case in the Appellate Division which deals exhaustively with the powers of the Board upon an annexation application and deals, also, with the matter of notice to persons affected. Since practice before the Board is a specialty in fact, this work will not deal with it.

MAINTENANCE & RECOVERY ACT, R.S.A. 1970, c. 223 as amended

The original application under s. 18 upon a complaint by an unmarried mother will not be dealt with exhaustively: it is quasi-criminal in nature: but for the purpose of clarifying the application which may be brought by the father under s. 22, the following is inserted in these notes:
Cases: Corroboration of the mother's testimony can be provided by a lie told by the putative father, for the lie discloses a guilty mind. The lie told by the respondent was held to be in law corroboration of the complainant's evidence. Kuchera v Menduk (1970) 73 W.W.R. 508. (Appellate Division)

A provisional order for maintenance under s. 5(1) may only be made in favour of a 'dependant' as defined in s. 2. A child is not a dependant until an affiliation order is made against the father so where the putative father lives in another province and does not submit to the jurisdiction of the Court the Order is a nullity and the respondent may ignore it. A provisional Maintenance Order based upon such an Affiliation Order is void and of no effect. (Appellate Division) Bodnar v Popovich [1974] 3 W.W.R. 658

Dmytrash v Chalifoux [1974] 6 W.W.R. 537 contains a discussion of the compellability of the respondent. He is competent and compellable and the Evidence Act (s. 8) has no application. The principles are discussed by the Appellate Division.

An application to reopen proceedings under this Act has an element of public interest which is lacking in ordinary litigation. New evidence must be substantial, but not necessarily decisive. Smolak v Necula, [1974] 1 W.W.R. 1 A.D.

Applicationto vary an Order or Agreement made under the Act: the application may be brought by the mother, the father or the Director.

Section 22 From time to time an application to vary an order or an agreement may be made to a judge ...
(2) upon such proof as he considers satisfactory

(a) that there has been a substantial alteration in respect of
  (i) the means of either parent, or
  (ii) the needs of the child, or
  (iii) the cost of living since the making of the order or agreement or the latest subsequent order varying either an order or an agreement

or

(b) that the father named in the order or agreement is, owing to the terms of the order or agreement, unable to provide the proper subsistence for his wife and legitimate children, if any, and for the education of the latter,

a judge may vary the original order or agreement, or subsequent order so made.

(3) Except with respect to an application by the Director, an order under this section may not vary the total amount of the specified sum to be paid under an order or agreement by which liability is to be finally satisfied upon the payment of a specified sum.

Section 23 provides for an Application to terminate an Order or Agreement. The Section provides that monthly payments terminate
- on the death or adoption of the child
- on the marriage of the mother or
- on the resumption of cohabitation by mother and respondent spouse.

The section provides for the reinstatement of the Order in the best interests of the child. See Section 23 (2) to (7) inclusive.

It is notable that the Act (Section 5(1)(b) authorizes the Minister to make regulations prescribing rules under which applications under the Act are to be made and dealing generally with all matters of procedure under the Act; but to 1978 no regulations have been produced.

An application to vary an Order or Agreement was heard by Cormack, D.C.J., in the matter of Hrycewich v Hegi (1965) 50 W.W.R. 237 and the headnote gives a succinct account of His Honour's views as to the procedure:

> When a signatory to a paternity agreement, made pursuant to the Child Welfare Act, RSA 1955 c 39, finds it necessary to dispute the terms or the enforcement of the agreement he cannot do so by treating it as an order from which he might normally appeal, even though by s 114(3) the agreement is deemed to be an order. It is analogous to a consent judgment and has the same force and effect as a judgment. It can only be varied or rescinded for reasons which would enable the Court, in an action, to vary or set aside a contract. (at page 237)

MARRIAGE ACT, R.S.A. 1970 c. 226

Application for an Order permitting the marriage of the applicant, notwithstanding that no consent has been given by parent or guardian.

Section 19 (1) Subject to subsection (2) a person
(a) who is not of the age of 18 years, and
(b) who is unable to obtain the consent of a parent or guardian required under section 18
may, upon notice to the parent or guardian, apply to a judge of the Court of Queen's Bench and the judge may in his discretion grant an order dispensing with the consent.

(2) No order shall be made under this section in respect of a person under the age of 16 years, unless that person is a female and is shown by a certificate of a duly qualified medical practitioner to be either pregnant, or the mother of a living child.

(3) Upon application therefor, the judge may make an order
(a) for substituted service of the notice, or
(b) for substitutional service on any person, or
(c) dispensing with service,
if he considers that prompt service of the notice is for any reason unlikely. [S.A.1965, c. 52, s. 19; 1970, c. 73, s. 3; 1971 c. 1, s. 18]

Practice regarding the form of "notice" is not prescribed. Originating Notice has been used but is not authorized by the Rules: semble the Part 30 application is appropriate.

There are no cases reported.

Application for an Order presuming death of a spouse.

Section 20(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the Court of Queen's Bench to have it presumed that the other party is dead, and the Court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death.

(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time is evidence that he or she is dead until the contrary is proved.
[S.A. 1965, c. 52, s. 20]

See also a similar application under the Insurance Act at p. 87 hereof.

MARKETING OF AGRICULTURAL PRODUCTS ACT, R.S.A. 1970 c. 225
as amended by S.A. 1976, c. 32

Appeal by producer, the Council having notified him under 26.1(1) that it refuses to hear the appeal and advises him to take his appeal to the Court.

Section 26.1 Notwithstanding s. 26, ss. 4 to 14, where
(a) a person commences an appeal under section 26(2) and
(b) the Council is of the opinion that the matter being appealed should be heard by a court
the council shall notify that person by written notice that it will not hear the appeal and advise that person to recommence the appeal in the Court of Queen's Bench.

(2) Upon being served with a notice under (1) a person may, not later than 30 days after being served with that notice, commence the appeal in the Court of Queen's Bench by way of originating notice.

(3) Where an originating notice is filed under (2) a copy of that originating notice and any supporting documents shall be served upon
(a) the Council and the producer board or marketing commission, as the case may be, where the matter being appealed is the decision of a producer board or marketing commission made under s. 26(1), or
(b) the Council where the matter being appealed is an order, direction or regulation of the Council
not less than 20 days before the date set in the originating notice for the hearing of the application.

(4) [the Court's powers on hearing the appeal]
(5) [the Court's powers as to costs]
(6) [directions for service of the originating notice]
[S.A. 1976, c.32, s. 12, page 131/132]

The form is originating notice, but the time is extended and the directions for service are contained in the Act.
It is worthy of note that this appeal may only be commenced in a case in which the Council itself is of the view that the appeal ought to be heard by a Court: S. 26(14) provides that the decision of the Council, otherwise, is final. The "notice" referred to in 26.1(1) is a prerequisite to the appeal.
There are no cases reported. There is no direction as to what the Court may consider, but section 26 sets out the material which may form the basis of the original appeal to the Commission.
It may be that since the section does not provide for an appeal from the Commission but rather for the substitution, at the instance of the Commission, of a Court for itself, Section 26 would apply.

MATRIMONIAL PROPERTY ACT, S.A. 1978 c. 22

The principal application for a Matrimonial Property Order is commenced by Statement of Claim and does not, therefore, form part of this work; however there are a number of applications authorized by the Statute which are permitted to be brought either by way of interlocutory application in the main action, or, as set out in s. 30, may be brought by originating notice.

Section 30. (1) An application under this Part
(a) may be made by originating notice,
(b) may be joined with, or heard at the same time as, a matrimonial cause between the spouses, or
(c) may be made as an application in an action or proceeding between the spouses under the Domestic Relations Act or Part I of this Act.
(2) An order may be made under this Part on an ex parte application if the Court is satisfied that there is a danger of injury to the applicant spouse or a child residing in the matrimonial home as a result of the conduct of the respondent spouse.
(3) If an application is made ex parte, the Court may dispense with service of notice of the application or direct that the originating notice be served at such time and in such manner as it sees fit.

If the application is made ex parte, the procedure will be that which is set out in Part 30: for the applicant will then appear in chambers with an Affidavit sworn by the applicant setting out the grounds of the application and the Court will direct such notice as it sees fit, either by Order or, perhaps, by way of endorsement upon the Application. [The procedure may not be directly authorized but semble, it follows logically from the above section.

The following are the Applications which may be brought under the Act:

Application for possession of the matrimonial home.

Section 19 (1) (a) [The Court may] direct that a spouse be given exclusive possession of the matrimonial home. (*) p. 114

Application for ejection of the spouse from the matrimonial home

Section 19 (1) (b) [The Court may] direct that a spouse be evicted from the matrimonial home; (*) p. 114

Application for an injunction restraining a spouse from entering the matrimonial home.

[Matrimonial Property Act, S.A. 1978, c. 22]

Section 19 (1) (c) [The Court may] restrain a spouse from entering or attending at or near the matrimonial home. (*)

(*) (2) In addition to making an order under ss (1) the Court may, by order, give a spouse possession of as much of the property surrounding the matrimonial home as is necessary, in the opinion of the Court, for the use and enjoyment of the matrimonial home.

(3) [the Order may be subject to conditions]
(4) [on application the Order may be varied]
Sections 21 to 24 enlarge upon the Order.

The application may be brought, as aforesaid, by Originating Notice, and may request any of or all of the remedies above listed in addition to those in (2).

Application for use and enjoyment of household goods

Section 25 (1) The Court, on application by a spouse, may by order direct that a spouse be given the exclusive use and enjoyment of any or all of the household goods.

(2) An order under ss (1) may be made subject to such conditions and for such time as the Court considers necessary.

(3) An order made under this section may be varied by the Court on application by a spouse.

S. 26 provides for registration of the Order at C.R. and M.V.B.

Application for an Order directing the cancellation of registration of the Orders registered pursuant to ss. 22, 23 or 26.

Section 29(1) The person against whose property an order is registered under s. 22 may apply to the Court for an order directing the Registrar of Land Titles to cancel the registration.

(2) the person against whose property an order is registered under section 23 or 26 may apply to the Court for an Order cancelling the registration.

(3) The Court may make an order under this section upon such conditions as the Court considers necessary.

The Statute is silent as to the material to be adduced in support of such an Order.

[Matrimonial Property Act, S.A. 1978, c. 22]

Application to restrain the transfer by a spouse of property to defeat a claim under the Act.

Section 34 (1) If the Court is satisfied that a spouse intends to transfer property to a person who is not a bona fide purchaser for value or to make a substantial gift of property that may defeat a claim of the other spouse under this Act, the Court may, by order, restrain the making of the transfer or gift.

(2) An application for an order under ss (1) may be made while the spouses are cohabiting.

(3) An application for an order under ss(1) may be made as an application in proceedings commenced under this Act or by originating notice.

(4) An application for an order under subsection (1) may be made ex parte.

(5) If an application is made ex parte the Court may dispense with service of notice of the application or direct that the originating notice be served at such time and in such manner as it sees fit.

No cases.

MEDICAL PROFESSION ACT, S.A. 1975, c. 26

Appeal from a decision of the Council.

Section 58 (1) A registered practitioner who is subject to an order of the council under this Part may, within 30 days of the date of the service of the order on the registered practitioner, his counsel or agent, appeal to the Court of Appeal.

(2) The appeal shall be commenced by

(a) filing a notice of appeal with the Registrar of the Court at Edmonton or Calgary, and

(b) serving a copy of the notice of appeal upon the registrar of the College

within 30 days of service of the order on the registered practitioner, his counsel or agent.

(3) [Application may be made for suspension of punishment, pending the appeal]

[Medical Profession Act, S.A. 1975, c. 26]

59(1)[The Appeal shall be founded upon a copy of the report of the committee, a copy of the record, the findings, the evidence before the council, all of which the registrar will certify]

60 [The procedure shall be, as far as may be, that provided for Appeals to the Court of Appeal from Queen's Bench]

The new Act is very similar in wording and in content to the procedure provided in the Legal Profession Act (infra, p. 108)

No cases are reported in respect of the procedure.

THE MENTAL HEALTH ACT, S.A. 1972 c. 118

Appeal from a decision of a review panel finding incapacity.

Section 46. (1) Within 14 days of a decision of a review panel, the applicant may appeal to the Court of Queen's Bench.

(2) The application shall be made by originating notice of motion.

(3) The notice of motion shall be served upon

(a) the Minister,

(b) the chairman of the board of the faility in which the applicant is a formal patient (if the applicant is a formal patient) and

(c) such other persons as the Court may direct,

not less than 15 days before the motion is returnable and the practice and procedure of the Court pertaining to applications by originating notice of motion applies, so far as it is applicable, to an application under this section, except as otherwise provided by this section.

(4) The application shall be supported by an affidavit of the applicant setting forth fully all the facts in support of the application.

(5) [Amended, 1975, c. 65, s. 7]

An appeal under this section shall be a rehearing of the matter on the merits, and in addition to any further evidence adduced by the applicant, the Minister or the Public Trustee, the Court may direct that any transcript or minutes taken by the review panel at the original hearing of the evidence be put in evidence on the appeal and may direct such further evidence be given as it considers necessary.

(6) An order of the Court under this section is not subject to appeal.

(7) The Court may make whatever order as to the costs of the application as it considers fit.

[The Mental Health Act, S.A. 1972, c. 118]

(8) The Court may
  (a) with respect to an appeal from a decision of a review panel to refuse to cancel admission certificates or renewal certificates,
    (i) quash the decision and order the cancellation of the admission certificates or renewal certificates, as the case may be, or
    (ii) order that the review panel reconsider the applicant's application for cancellation, or
    (iii) make such other order as it considers just.

The Statute denominates the originating document an 'originating notice of motion' and refers to it in 46(3) as a 'notice of motion', which indicates, certainly, that the dichotomy between the two terms is not written in stone in the legislative mind.

No cases are reported.

MORTGAGE BROKERS REGULATION ACT, R.S.A. 1970, c. 242, as amended in S.A. 1977, c. 59

Appeal from a decision of the Superintendent of Real Estate appointed under the Real Estate Agents' Licensing Act, by a person whose registration as a Mortgage Broker has been refused, cancelled or suspended.

Section 24. (7) [1977, c. 59] A person whose appeal is heard by an Appeal Board, or the Superintendent, may appeal the decision of the Appeal Board by filing an originating notice with the Court of Queen's Bench within 30 days of being notified in writing of the decision and the Court may make any order that an Appeal Board may make under ss (4).

As mentioned supra, powers of the Appeal Board are listed in 1977, c. 59, s. 11 (page 472); the constitution of the Appeal Board is provided for in (5), directly following.

To date there are no cases reported.

The Commission has exceedingly wide powers and these are listed in ss. 17 to 20: the powers are now exercised by the Superintendent. The Act does not make clear whether new evidence may be adduced upon appeal.

MUNICIPAL ELECTION ACT, R.S.A. 1970, c. 245

Elector's application for Recount of Votes, on payment of security for costs.

Section 132. (1) At any time within 15 days from the time of the declaration of the result of an election by the returning officer, any elector may apply to the Court of Queen's Bench by notice of mo--tion for a recount, after the elector has

(a) filed an affidavit with the clerk of the court that the returning officer or a d.r.o. or other officer, in counting the votes given at the election, improperly counted or rejected ballot papers, and

(b) deposited with the clerk of the court the sum of $300 as security for costs and expenses.

(2) The deposit of $300 shall not be paid out .. without the order of a judge.

133. At least 3 days prior to the application, a copy of the notice of motion and affidavit filed shall be served by the elector on the municipal secretary, the returning officer and all candidates, or such candidates as the judge may direct.

134. Upon the hearing of the application the judge shall ... [fix a time and place for the recount and direct service of notice]

Sections 135-138 provide for the procedure at recount.

There would not seem to be any cases directly on judicial recount. In Smallwood v Willerton (1977) 7 A.R. 356 the District Court judgment concerns a difficulty which arose because the d.r.o. initialled the face of some ballots, rather than the reverse. The judgment discusses the relevant sections of the Municipal Elections Act and the judge directs the parties to seek a Fiat to bring an inquiry in Quo Warranto proceedings. There is judicial comment on the statute.

Application by a candidate or a qualified elector to determine whether an election, or a voting on a money bylaw, was valid, or upon an allegation that a council member has become disqualified and has not resigned.

Sections 157 to 179, which are too lengthy to be reproduced herein, deal with the procedure to be followed where it is alleged that by reason of an irregularity, the respondent should forfeit his seat on the council.

The limitation of six weeks is dealt with in Regina ex rel Fraser v Tuckey [1975] 3 W.W.R. 191, a case in the District Court which clarifies the provisions of Section 169 of the Act. "Election" in S. 169 means not only the completion of voting but also completion of counting and the time begins to run only after the count is completed.

[Municipal Election Act, R.S.A. 1970, c. 245]

There is a preliminary application for a *fiat* permitting the filing of the Notice of Motion. (S. 169, (1) and (2).)
Recognizance is prescribed (s. 169(3))
Contents of the Notice of Motion are set out in Ss. 170 to 174
Service is discussed in S. 172
Proceedings are described in Ss 175 to 180.

The procedure would seem to be analogous to that prescribed by the *Municipal Government Act*, *infra*, and the cases quoted in respect of those applications are relevant to this one.

However Cf. *Danyluk* v *Toschach*, (1970) 72 W.W.R. 517; a decision on an application under the *Municipal Government Act* had been sought and obtained. On an application under the *Municipal Election Act* the respondent pleaded *res judicata*. The judgment covers the question of *res judicata* very fully and lists and discusses the authorities.

MUNICIPAL GOVERNMENT ACT, R.S.A. 1970 c. 246

Application by an elector to the Court for an Order declaring a member of Council not qualified.

Section 32 (1) Upon the *ex parte* application of an elector who
(a) files an affidavit showing that a member of a council never was or has ceased to be qualified as a member of the council, and
(b) pays into court the sum of $50 as security for costs to abide the event of the application,
a judge of the Court of Queen's Bench may direct that there be served upon that member notice of an application for an order declaring him to be disqualified to be a member of the Council.

Ellsworth v *Boisvert* [1974] 2 W.W.R. 250 at page 252 describes the procedure in detail and is authority for the interesting proposition that the preliminary application does not constitute "proceedings".

[Section 32] (2) Upon hearing the application and such evidence, either oral or by affidavit, as he requires the judge
(a) may, by order, declare the member to be disqualified, or
(b) may refuse the order,
and, in either case, with or without costs.

Wanamaker v *Patterson* [1973] 5 W.W.R. 193, in the Appellate Division of the Supreme Court and *Re: Buzunis* [1975] 1 W.W.R. 233, are landmark decisions in the interpretation of the above section and, indeed, in the interpretation of statutes generally. *Re: Buzunis* would appear to have moved the Legislature to action, for in the Statutes of Alberta 1975, following that decision, we find the following amendment to the Act by way of clarifying directive. [Re: Buzunis said that "may" in s. 32(2)(a) should be read "must"]

Section 32.1 [S.A. 1975 (2) c. 69, s. 11
Where an application under section 31 or 32 is before a judge and the judge finds that a member is disqualified, he may nevertheless dismiss the application where he is of the opinion that the disqualification arose inadvertently or by reason of a bona fide error in judgment.

Section 32.2 deals with an intervening election, which complicated the issue in Casson v Reed [1975] 6 W.W.R. 431; and the section confirms the view of the Court of Appeal in that case.

From a procedural point of view, the most interesting of the above cases is Ellsworth v Boisvert [1974] 2 W.W.R. 250, which holds in the Court of Appeal that the preliminary application for a Fiat does not institute proceedings and the terminology is of interest, for if this is true (and since the Court of Appeal has said so, there can be no question), query whether the affidavit sworn in support of the application for fiat is receivable in evidence. Query also whether, if the rule quoted in Civil Procedure: Proceedings in Chambers (Notes prepared for the Course in Civil Procedure by Professors Pollock, Drewry and Vogel) at page 4 (paragraph 6(f)) is of universal application, this pronouncement by the Court of Appeal might not have much more extended application in practice. Wherever a preliminary application is authorized or directed, does an affidavit sworn in support of the preliminary application, before the issue of a notice of motion or originating notice constitute evidence receivable in respect of the principle application?

Casson v Reed [1975] 6 W.W.R. 431 also deals with the proposition that there was a duty on the mayor to ensure that his abstention was recorded in the minutes of a meeting. This proposition was spurned by the Court of Appeal, and it was held that while such care might have been politic, nothing imposed upon him such a duty.

Application by owner of land or occupier who receives a notice to abate a nuisance for an Order setting aside or modifying the notice or direction, upon the grounds that Council has acted unreasonably.

Section 157 (4) [The Section, (1), (2) and (3) empowers council to make bylaws to regulate the tenure of premises and the powers granted are exceedingly wide]

(4) Any owner ... or occupier who receives a notice ... requiring him to abate a nuisance or to remedy any condition that constitutes a nuisance or that contravenes ... a by-law passed

[Municipal Government Act, R.S.A. 1970, c. 246]

under this section and who thinks himself aggrieved may appeal within 10 days to the Court of Queen's Bench and if it is satisfied that the council has acted unreasonably or unjustly or in a manner contrary to the intent and meaning of this section, it may set aside, vary or modify the notice, order or direction of the council.

[1968, c. 68, s. 157; 1969, c. 75, s. 22; 1970, c. 80, s. 9]

No cases are reported. No procedure is prescribed. It is interesting to note that the fact that a bylaw is unreasonable is not grounds for quashing it (s. 113 and Cf. Falardeau and Parkland Trailer Court (Hinton) Ltd (1977) 5 Alta L.R. (2d) 122 and it is submitted that the sections conflict.

Appeal by owner or occupier of land from demolition Order

Section 158(7) Any person who thinks himself aggrieved by an order of the council made under this section [to remedy the condition of premises or demolish: in default of which Council will do so and charge the cost to the owner] may apply to the Court of Queen's Bench within 30 days from the making of the order [of which the owner or occupier has 14 days' notice to attend at council meeting] and if the Court is satisfied that

(a) the proper procedure as set forth in this section has not been followed, or

(b) that the council has acted in a manner contrary to the intent or meaning of this section,

it may set aside, vary or modify the order of the council as it considers just.

There are no cases reported on the section and there is no authorized procedure set out in the Act.

Application to quash By-law, Order or resolution of Council for illegality.

Section 397. (1) Any elector of the municipality may, by notice of motion, apply to a judge of the Court of Queen's Bench to quash any by-law, order or resolution of the council in whole or in part for illegality.

(2) The judge, upon such motion, may quash the by-law, order or resolution in whole or in part and may, according to the result of the application, award costs for or against the municipality and may determine the scale of the costs.

(3) The notice of motion shall be served at least seven clear days before the day on which the motion is to be made.

[Municipal Government Act, R.S.A. 1970, c. 246]

(4) Before any such motion is made the applicant, or where the applicant is a corporation some person on its behalf, shall enter into a recognizance before the judge himself in the sum of $100, with two sureties each in the sum of $50, of which it shall be a condition that the applicant will prosecute the motion with effect and pay any costs that might be awarded against him.

(5) The judge may allow the recognizance upon the sureties entering into proper affidavits of justification and thereupon it shall be filed in the district court with the other papers relating to the motion.

(6) In lieu of the recognizance mentioned in subsections (4) and (5), the applicant may pay into court the sum of $100 as security for any costs that might be awarded against him, and the certificate of payment into court shall be filed in the district court with the other papers relating to the motion.

(7) Upon the determination of the proceedings the judge, in his discretion and having regard to the result of the application, may order the money paid into court to be applied in the payment of costs or to be paid out to the applicant.

(8) All moneys required to be paid into or out of court under this section shall be paid in and paid out in like manner as moneys are paid into and out of court in actions pending in the court.

(9) No application to quash a by-law, order or resolution in whole or in part shall be entertained unless the application is made within two months or, in the case of a by-law passed under section 139, one month from the passing of the by-law, order or resolution, except where a by-law requires the assent of the electors and the by-law has not been submitted to or has not received the assent of the electors entitled to vote thereon, in which case an application to quash the by-law may be made at any time.
[1968, c. 68, s. 397]

The application is stated to be by Notice of Motion, on at least seven clear days before the day of hearing.

The cases:
There is no power under s. 397 to declare a bylaw illegal upon the grounds that notice has not been given to an elector or electors; but where a council does something by resolution which requires a Bylaw, the resolution may be quashed.
Christmas v Edmonton, (1970) 75 W.W.R. 453

The Court will not give effect to objections to Bylaws founded upon a Municipality's failure to follow its own established procedure unless there is clear evidence of bad faith.
Schmal v City of Calgary (1977) 9 A.R.

A Bylaw may not be quashed simply because it is unreasonable.
(Sec. 113) and Falardeau and Parkland (1977) 5 Alta L.R. (2d)

Several grounds for quashing are discussed in Western Realty Projects Ltd v City of Edmonton [1975] 1 W.W.R. 681 (Court of Appeal) and the case is worth reading from a procedural point of view.

As to the status of the applicant to bring the application, see the Western Realty Projects case, supra, which holds that unless a corporation is on the assessment roll it has no status to bring an application as a 'proprietary elector': and this is true although it may have equity in property within the municipality. The assessment roll is the criterion followed by the Court of Appeal.

Where the question has become academic by reason of the quashing of the offending Bylaw, will the Court of Appeal hear an appeal in respect of the original objection? Our Court of Appeal held that the hearing should proceed because the matter was of interest to other municipalities. The decision was upon this point discretionary, but was decided affirmatively in Henning v City of Calgary, [1974] 3 WWR 493.

Limitation periods were discussed in the Court of Appeal in Fraser v City of Calgary (1978) 6 Alta L.R. (2d) 210. Under s. 397(a) of the Act it is provided that no application shall be entertained unless made within 2 months from the passing thereof: or one month, if the Bylaw is passed under s. 139; (the other exception is not relevant). "Application made" means that the motion must be returnable within the stated period.

A Bylaw may be quashed if it does not comply with the mandatory requirements of the enabling statute. In this case the Enabling Statute was The Planning Act. Nichol v County of Leduc No. 25 [1973] 2 W.W.R. 85.

Along the same lines was Dales v Edmonton (1978) 8 Alta L.R. in which the City negotiated for part of the applicant's land: negotiations broke down and the City resolved to expropriate the whole of the land. The Bylaw was quashed, for (see s. 130(1) of the Municipal Gov't Act) the City must first negotiate for the entire parcel which it subsequently resolves to expropriate. S. 127(10) does not authorize the City to proceed without first complying with s. 130(1).

A recent and interesting case which might provide a precedent for drafting purposes is reported at (1978) 12 A.R. 418. Moffat v Edmonton, in which a Bylaw concerning Body Rub Parlors was declared to be intra vires.

Since a judge on an application under Section 397 of the Municipal Government Act is not acting as persona designata, an appeal lies from his decision to the Court of Appeal.
Simons v Edmonton, [1974] 1 W.W.R. 160. And the case discusses the principles applicable to a stay of proceedings pending appeal.

Application to quash a By-law procured through or by means of bribery

Section 398. Any By-law the passing of which has been procured through or by means of contravention of section 158 or 159 of The Municipal Election Act may be quashed upon an application made in conformity with the provisions therein contained.

Sections 158 and 159 describe the offence of bribery and undue influence, respectively, and Section 161 provides:

161. When upon a motion in the nature of a quo warranto a question is raised relating to whether the candidate, voter or other person has been guilty of bribery or undue influence, viva voce evidence shall be used to prove the offence and evidence by affidavit shall not be used to prove the offence. The issue is always raised by Affidavit: see page 119, supra.
Query, whether upon an application to quash a Bylaw the provisions of s. 161 also apply. It would not seem so, for s. 161 specifically refers to the question being raised in the context of a motion in the nature of quo warranto, which relates to the competence of the official to hold his seat on the council.

Application by Council to obtain an injunction to stop the erection of a building or any land use in contravention of a Bylaw.

Section 405 Where any building is erected or is being erected or is being used, or where any land is being used, in contravention of any by-law of a municipality, or where the breach of a by-law is of a continuing nature or where any person is carrying on business or is doing any act, matter or thing without having paid any license or permit fee required to be paid in respect thereof, then in addition to any other remedy and to any penalty imposed by the by-law, the municipality may, in any of those cases, apply to a judge by way of action or originating notice for an injunction or other order, and the judge may grant or refuse the injunction or other order or may make any other order that in his opinion the justice of the case requires, and an appeal to the Court of Appeal lies from any order made by a judge hereunder. [1968, c. 68, s. 405]

[Municipal Government Act, R.S.A. 1970, c. 246]

Stettler v *Bartscher* (1978) 8 Alta L.R. (2d) 347, in the Trial Division, is an instance of an application by the Municipality for an Order directing a homeowner to comply with the provisions of a Bylaw and is probably useful as a precedent. The views of the Trial Division are stated in respect of policy on such an application.

NATUROPATHY ACT, R.S.A. 1970 c. 257

Appeal from a decision of the council expelling or suspending a member.

Section 8 (8) A member suspended or expelled from the Association may appeal from the decision of the council to a judge of the Court of Queen's Bench at any time within 14 days after the date of the Order or Resolution of suspension or expulsion, or within such further time as a judge of the Court of Queen's Bench may order.

The earlier portions of the Section lay down the rules for the hearing of a complaint against a member by the council: notable is the requirement that evidence shall be given under oath (and this would indicate that evidence shall therefore be given viva voce)(s. 8(6)).

The time rule (s. 8(8)) should be read in conjunction with cases on other Statutes regarding time limitations: see, for example, *Fraser* v *City of Calgary*, (*supra*) (page 123) and this case underlines the necessity, in an appeal of this kind, for an early application extending the time for the appeal from the 14 days, since *the motion must be returnable within the stated period*. (The italics are mine)

No form of originating document is prescribed by the Statute and no case indicates whether the judge hearing the appeal is considered *persona designata*, though the wording 'to a judge of the Court of Queen's Bench' rather than 'to the Court of Queen's Bench' may render the point arguable.

OCCUPATIONAL HEALTH AND SAFETY ACT, S.A. 1976, c. 40

Appeal upon a question of law or jurisdiction from an Order made by the Council

Section 11(5) [which has to do with the protection of workers on a project, and authorizes the Director of Inspection to issue Orders to persons, which Orders may be appealed to the Occupational Health & Safety Council] From such Orders:

(5) An appeal lies to the Court of Queen's Bench from an order of the Council upon a question of law or a question of jurisdiction and upon hearing the matter the Court may make such order,

[Occupational Health and Safety Act, S.A. 1976, c. 40]

including the awarding of costs, as the Court considers proper.

(6) An appeal under (5) shall be made by way of originating notice within 30 days from the date that the order of the Council is served upon the person appealing the order of the Council.

(7) [the commencement of the appeal does not operate as a stay of the Order - (8) except if a Judge so directs]

The prescribed procedure is Originating Notice but the nature of the Order, semble, is certiorari. Unfortunately there are not to date any cases reported.

OIL & GAS CONSERVATION ACT, R.S.A. 1970 c. 267
Part 11; Assessment and Taxation of Oil and Gas Properties

Application for reference of question of law to a Judge

Section 76. (1) When a question of law arises with respect to any decision of the Board [The Oil and Gas Conservation Board] made pursuant to any of the provisions of this Part, any person affected thereby may, within 30 days after the date upon which the decision was made, give notice in writing to the Board requiring the question to be referred to a Judge.

[The Board applies to the Judge to fix a time and place for hearing and shall hear evidence orally or by affidavit: and there is no appeal from his Order]

OPTHALMIC DISPENSERS ACT, R.S.A. 1970 c. 267

Appeal from suspension or removal from practice by Order of the Council of the Opthalmic Dispensers Guild.

Section 28. A person whose name has been removed from the register or who has been suspended from practice by order of the council may appeal from the order either

(a) to a general meeting of the Guild by ordinary resolution, or

(b) directly to a judge of the Court of Queen's Bench in Chambers by Originating notice of motion.

Section 29 sets out what the Judge shall consider, what he may consider, and what he may decide.

The originating document is prescribed as an Originating Notice of Motion and the jurisdiction of the judge in chambers is specifically provided for, although note that the judge may hear oral evidence on the application. In the alternative, the judge may direct a trial.

[Opthalmic Dispensers Act, R.S.A. 1970, c. 267]

No cases are reported.

OPTOMETRY ACT, R.S.A. 1970 c. 270

Appeal to the Court disputing the validity of election of the officers of the Association.

Section 9. (1) A member of the Association may dispute the validity of an election [of officers of the Association] under Section 8 or the validity of the election of one or more of the persons declared elected by petition to the Court of Queen's Bench filed within 30 days of the date of the election.

(2) The petition shall be heard by a judge of the Court of Queen's Bench in a summary way.

(3) Where it appears to the judge that the election or the voting was conducted substantially in accordance with the requirements of this Act and the by-laws and that the non-compliance, violation, mistake or irregularity did not materially affect the result of the election or the voting, he may adjudge the election or the voting to be valid.

(4) and (5) give the powers of the judge where he finds the election invalid.

(6) the decision of the court is final and the costs of the proceedings shall be in the discretion of the judge.

The application is brought by Petition and presumably is supported by an affidavit to the effect that the election did not conform with the Act or the by-laws: for 9(3) does not indicate any other basis for finding the proceedings invalid.

Appeal from a finding of conduct unbecoming an Optometrist and a consequential Order under s. 17.

Section 30. (1) A member who has been found guilty of conduct unbecoming an optometrist may appeal to the Court of Queen's Bench by originating notice of motion

(a) from the finding of guilt, or

(b) if an Order has been made against him under s. 17, from the finding of guilt and the order or from the order only,

within 30 days of the date that the member was served with a copy of the Council's findings and the order, if any, made under s. 17.

Note that the original proceedings before the Council are conducted in accordance with s. 26 and that section specifies that in the reception of evidence the Council is not bound by legal rules.

[Optometry Act, R.S.A. 1970, c. 267]

[Section 30] (2) The Registrar, upon the request of any person desiring to appeal, shall furnish him with a certified copy of all the proceedings, reports, orders and papers upon which the council acted in making the order appealed against.

(3) Notice of the appeal shall be given to the Registrar.

(4) The Member may, after commencing his appeal and upon notice to the Secretary-Treasurer, apply to any judge of the Court of Queen's Bench for an order staying the imposition of any punishment under an order made pursuant to section 17.

Section 31 lists those things which the Judge shall consider and he may hear new evidence. He may also direct an issue.

There are no reported cases.

PARTNERSHIP ACT, R.S.A. 1970, c. 271

Application by the Creditor of a partner for an Order charging the partner's interest in the firm with the judgment debt.

Section 25. (1) A writ of execution shall not issue against partnership property except on a judgment against the firm.

(2) The Court or a judge thereof on application by notice of motion by a judgment creditor of a partner

(a) may make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest on the judgment debt, and

(b) may, by the order referred to in (a) or a subsequent order

(i) appoint a receiver of that partner's share of profits whether already declared or accruing, and of any other money that might be coming to him in respect of the partnership, and

(ii) direct accounts and inquiries, and give other orders and directions

(A) that might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or

(B) that the circumstances of the case require.

S. 26 - A judge of the Court, whether sitting in chambers or in Court, may at any time exercise all the powers conferred by this Act upon the Court.

In Partnership matters see also Rules 80 to 83 and in connection with the above application, see specifically Rule 82(4) and (5).

[Partnership Act, R.S.A. 1970, c. 271]

Application by a partner for a decree of dissolution of a firm.

Dissolution by the Court

38. (1) On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a*) where a partner is shown to the satisfaction of the Court to be of permanently unsound mind;

(*b*) where a partner other than the partner suing becomes in any way, other than through permanent unsoundness of mind, permanently incapable of performing his part of the partnership contract;

(*c*) where a partner other than the partner suing has been guilty of such conduct as in the opinion of the Court, regard being had to the nature of the business, is calculated to affect prejudicially the carrying on of the business;

(*d*) where a partner other than the partner suing wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him;

(*e*) where the business of the partnership can only be carried on at a loss;

(*f*) where circumstances have arisen that in the opinion of the Court render it just and equitable that the partnership be dissolved.

(2) In a case arising under subsection (1), clause (*a*) the application may be made

(*a*) on behalf of the partner alleged to be of permanently unsound mind by his guardian, next friend or a person having a right to intervene, or

(*b*) by any other partner. [R.S.A. 1955, c. 230, s. 38]

[Partnership Act, R.S.A. 1970, c. 271]

Application on dissolution by any partner to wind up the business and affairs of the firm.

Section 42 (1) On the dissolution of a partnership each partner is entitled, as against the other partners and persons claiming through them in respect of their interests as partners,

(a) to have the property of the partnership applied in payment of the debts and liabilities of the firm, and

(b) to have the surplus assets after such payment applied in payment of what is due to the partners respectively after deducting what is due from them as partners to the firm.

(2) For the purposes of ss (1) any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

No cases are reported, nor is the method of bringing the application prescribed in the Statute. The application has been brought by Originating Notice and semble should be initiated under Part 30.

Application by Limited Partner for winding-up of the Partnership.

Section 57(c) A limited partner has the same right as has a general partner ...

(c) to obtain dissolution and winding up of the limited partnership by Court Order.

The provisions of Section 38(1) presumably apply to Limited partnerships, and Cf Section 72 re: settling accounts upon dissolution.

Application by the Creditor of a Limited Partner for an Order charging his interest in the Firm.

Section 75(1) The Court may, upon the application by a judgment creditor of a limited partner, charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt, and may appoint a receiver and make all other orders, directions and inquiries which the circumstances of the case require.

No cases and no legislative directive as to how the application is to be brought, though it is clear from the Section what the criteria are; a suitable affidavit would appear to suffice under Part 30 after which the Court would direct service.

[Partnership Act, R.S.A. 1970, c. 271]

Application for an Order directing cancellation or amendment of Limited Partnership Certificate.

Section 70(1) Where anyone designated under s. 68 or 69 as being a person who must sign a notice to cancel or amend a certificate [all partners must sign] refuses to do so, a person desiring the cancellation or amendment may apply to the Court for an Order directing the cancellation or amendment.
[The Court may direct the cancellation or amendment by the registrar of C.R.]

Not surprisingly, there are no cases reported.

PHARMACEUTICAL ASSOCIATION ACT, R.S.A. 1970, c. 274.

Appeal from suspension or expulsion from the Register.

Section 26. (1) A person
(a) whose name has been ordered to be erased from the register or
(b) who has been suspended by order,
may appeal to a judge of the Court of Queen's Bench in chambers at any time within 30 days after the date of the order.

(2) Where an appeal is made under this section, the operation of the order of the council is suspended until such time as the judge has finally pronounced thereon.

(3) The appeal may be by motion, notice of which shall be served upon the registrar within the time limited for appeal, and the registrar shall, upon request and at the cost of any person desiring to appeal, furnish to him a certified copy of all proceedings, reports, orders and papers upon which the council has acted in making the order complained of.
(4) gives the judge's powers on appeal but does NOT specifically empower him to hear new evidence.

It is interesting to note that the Council is not absolved, by the Legislature, from adhering to the established rules of evidence in the course of its investigation.

The Court of Appeal in Dancyger v Alberta Pharmaceutical Association [1971] 1 W.W.R. 371, discusses at length the disciplinary procedure provided for in the Act. The matter of the investigating members of council sitting on the review committee is covered at pp 376 and 377 of the report of the judgment. The Act and the authorities are reviewed.

THE PLANNING ACT, S.A. 1977 c. 89

Appeals, limited by the Act to questions of Law and Jurisdiction.

Section 146. (1) Subject to ss (2), upon a question of law or upon a question of jurisdiction, an appeal lies to the Court of Appeal from the Board or a development appeal board.

(2) An application for leave to appeal pursuant to ss (1) shall be made

(a) to a judge of the Court of Appeal and

(b) within 30 days after the issue of the order, decision, permit or approval sought to be appealed

and notice of the application shall be given to the Board or the development appeal board, as the case may be, and such other persons as the judge may direct.

(3) Upon hearing the application and the representations of those persons who are, in the opinion of the judge, affected by the application, the judge may

(a) grant leave to appeal

(b) direct which persons or other bodies shall be named as respondents to the appeal,

(c) specify the questions of law or the questions of jurisdiction to be appealed, and

(d) make such order as to the costs of the application as he considers appropriate.

(4) Where an appeal is from a development appeal board, the municipal corporation shall be given notice of the application for leave to appeal and shall be a respondent to the application, and if leave is granted, a respondent to the appeal.

Section 147. (1) On the hearing of the appeal

(a) no evidence other than the evidence that was submitted to the board or the development appeal board, as the case may be, shall be admitted, but the Court may draw such inferences

(i) as are not inconsistent with the facts expressly found by the Board or the development appeal board, as the case may be, and

(ii) as are necessary for determining the question of law or the question of jurisdiction,

and

(b) the Court shall either confirm, vary, reverse or vacate the order, decision, permit or approval.

(2) [provides for a rehearing by the Board appealed from, in the light of the decision of the Court]

(3)[The Court may make its own rules governing these appeals but until it does the ordinary rules governing appeals apply]

PODIATRY ACT, R.S.A. 1970, c. 277

Appeal from expulsion or suspension

Section 13. (1) Any member who has been expelled or suspended from the Association may appeal from the order of the Council to a judge of the Court of Queen's Bench in chambers, at any time within 14 days of the date of the order of expulsion or suspension, or within such further time as a judge of the Court of Queen's Bench may order.

(2) On the request of the Appellant, a copy of the evidence taken at the hearing before the Council shall be filed with the clerk of the court for the judicial district in which the appellant resides.

(3) The judge may receive further evidence by oral examination or by affidavit or

(b) direct a trial to determine all or any of the matters in issue.

No cases. Note that the Judge in chambers is specifically authorized to hear the Appeal, albeit he is also authorized to hear evidence in addition to that which was taken by the Council appealed from.

POSSESSORY LIENS ACT, R.S.A. 1970 c. 279

Application for an Order for sale of perishable goods

Section 9. (4) When a bailee has in his possession perishable goods that might deteriorate or be destroyed by detention,

(a) he may forthwith apply to a judge for leave to sell the goods, and (b) on such application the judge may forthwith give directions for the sale of the goods or may make such order in the matter as to him seems just.

Note that s. 13 specifies that this Act only applies where there is no other legislative provision applicable for determining the rights of the owner and the bailee, and s. 13 specifically excludes liens under The Livery Stable Keepers Act or The Warehousemen's Lien Act, and The Innkeepers Act.

Application for an Order for sale of chattels detained.

The Statute provides, first, that notice shall be served upon the debtor specifying, (at the expiration of 6 months or 3 for M.V's)

(a) a reasonable time and place for payment
(b) amount owing and property detained
[value of the property detained?]
(c) that in default an application will be made [day, place, time of application] for an Order for Sale

NOTICE must be given by D.R. Mail or personal service or as set out in Section 11, by substituted service by Order, or the judge may dispense with service: see s. 11.

(3) The day fixed for the application is 30 days (not less) from service of the notice
[the Act says 'from mailing or serving the Notice', but clearly 'mailing' refers to a service under s. 11]

Section 10. (4) If the amount claimed is not paid to the bailee

(a) the bailee may apply on the day and at the hour and place specified in the notice to a judge informally for a sale of the goods and chattels, and
(b) the judge may make such order as to him seems just with respect to the sale and the manner of conducting it.

The above is not complete and before making an application it is essential to peruse the entire Statute. The procedure is dictated in some detail in the Act but the form of application is not prescribed and there are no cases on the subject. Note that the provisions for service are more stringent than those provided for in respect of an application for an Order for Sale under Distress (Section 37 of the Seizures Act)

PSYCHIATRIC NURSES ASSOCIATION ACT, R.S.A. 1970 c. 289

Appeal from expulsion or suspension

Section 15. (1) Any member who has been expelled or suspended from the association may appeal from the order of the council to a judge of the Court of Queen's Bench, at any time within fourteen days of the date of the order of expulsion or suspension, or within such further time as a judge of the Court of Queen's Bench may order.

(2) On the request of the appellant, a copy of the evidence taken at the hearing before the council shall be filed with the clerk of the court for the judicial district in which the appellant resides.

(3) The judge on the appeal may make such order or give such direction as to the expulsion or suspension and as to the costs of the appeal as to him seems just.

No legislative direction as to procedure; no cases.

PSYCHIATRIC NURSING TRAINING ACT

Appeal from cancellation of certificate

Section 5 (1) [after an inquiry the committee may cancel a certificate]

(2) A person whose certificate is ordered cancelled may appeal on originating notice to the Court of Queen's Bench within 30 days of the service on him of notice of the order or within such further time as a judge of the Court of Queen's Bench may order.

(3) A person appealing against an order of the committee shall serve notice of the appeal upon the chairman of the committee within the time limited for appeal.

(4) The judge upon hearing the appeal may make an order either confirming or reversing the order of the committee appealed against.

The appeal is launched by originating notice; there is not, however, any legislative direction as to what material will be made available to the Court on appeal, whether new evidence may be heard, whether the appeal may be heard in Chambers, and there are no cases reported on the section.

PSYCHOLOGISTS ACT, R.S.A. 1970, c. 291.

Appeal from suspension or cancellation of Certificate.

Section 20(1) Subject to this Section and the regulations, the council may, by order, suspend or cancel the registration ...

(2)(3)(4) Evidence must be given under oath before the council and a record kept of the evidence adduced.

[Psychologists Act, R.S.A. 1970, c. 291]

Section 21(1) Any psychologist whose registration has been suspended or cancelled for unprofessional conduct or incompetency may appeal to the Court of Queen's Bench from the finding of guilt or the order of punishment, or both.

(2) An appeal shall be commenced by originating notice of motion filed within 30 days from the date on which the finding and order, if any, is made by the council.

(3) On the request of the appellant, the Registrar shall file a copy of the evidence taken at the hearing before the council with the clerk of the court for the judicial district in which the appellant resides.

The hearing before the Council (provided for, supra, in sec. 20,) permits of no evidence which could not be adduced before a Court of law: but there are no cases on the section to confirm this view.

PUBLIC HIGHWAYS DEVELOPMENT ACT, R.S.A. 1970, c. 295

Application under the Statute appealing from an Order of the Minister with respect to a building, structure, fixture or excavation.

Section 27 (6) Any person who thinks himself aggrieved by an Order of the Minister made under this section may apply to the Court of Queen's Bench within 30 days from the date of making the order and if the Court is satisfied that

(a) the proper procedure as set forth in this section has not been followed or

(b) the Minister has acted in a manner contrary to the intent and meaning of this section,

the Court may set aside or vary the order of the Minister as it considers just.

No direction is given as to how the application is to be brought and the appeal, moreover, is of such very limited application as to be of limited value. There are no cases reported.

Application for an Order fixing compensation to an owner of land or directing the removal of a roadside improvement.

Section 43. Where a highway authority is of the opinion that a roadside improvement on or over land adjacent to a highway

[is undesirable as set out in ss (a) to (e)

and the .. authority is unable to agree with the owner for its removal or as to the amount of compensation to be paid therefor, the highway authority may apply by originating notice of motion to the Court of Queen's Bench for an order authorizing it to enter upon the land affected to remove any roadside improvement with respect to which the application is made, and the judge, upon such notice to the owner as he deems proper, may make such order and may fix the amount of compensation to be paid to the owner and give such directions as to costs as in his opinion are just.

The application is by originating notice 'upon such notice as a court shall direct', necessitating two applications. The applicant is the authority: there is no provision for application by the owner of the premises.

PUBLIC TRUSTEE ACT, R.S.A. 1970, c. 301

Application for an Order declaring a person to be a "missing person".

Section 10. (1) If it is proved to the satisfaction of a judge of the Court of Queen's Bench that a person is a missing person within the meaning of this Act, the judge

(a) may declare that person to be a missing person, and
(b) by order may appoint the Public Trustee as trustee of the property of the missing person.

(2) The Public Trustee on the order of a judge of the Court of Queen's Bench may mortgage, lease, sell or otherwise dispose of any of the real or personal property of the missing person.

(3) The Registrar of the N.A.L.R.D. [on the strength of the Order may register an instrument executed by the P.T.]

The Public Trustee often launches the application, but need not. Section 11 provides that the Public Trustee may pay out sums of money for the dependents of the missing person and may distribute the Estate after 2 years from the Order under 10(1).

There are no cases reported. Part 30 would seem to be indicated. The definition of "missing person" is given in the Act and is very broad: all that is necessary is that the person cannot be found.

Application by 'a person' for an Order appointing the Public Trustee a judicial trustee under the Trustee Act.

Section 32. (1) A person may apply to the court for an order appointing the Public Trustee a judicial trustee under The Trustee Act.

(2) The court by order may appoint the Public Trustee a judicial trustee where in the opinion of the court or judge thereof it is expedient to do so.

S. 33 having been repealed the above section is probably now of very limited application.

PUBLIC UTILITIES BOARD ACT, R.S.A. 1970 c. 302

Appeal from a decision of the Board upon a question of law or jurisdiction, with leave from the Court of Appeal.

Sections 62, 63, 64, 65 and 66 govern the appeal which is limited in scope as above mentioned and which is also limited to a consideration of the material which was before the Board.

The appeal is further limited by Section 67 which reads:

> Except as otherwise provided in this Act
> (a) every decision or order of the Board is final, and
> (b) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court.

Proceedings hereunder do not fall within the scope of this work. The following cases, however, are included for their academic interest for they indicate the nature of proceedings referred to in the section.

Calgary Power Ltd v City of Camrose [1973] 1 WWR 126 (A.D.)
(1974) N.R. 70 (S.C.C.)

Northwestern Utilities Ltd & City of Edmonton v Public Utilities Board (1976) 2 A.R. 317 (A.D.) (1978) 7 Alta L.R. (2d) 370 (S.C.C)

Dome Petroleum Ltd et al v Swan Swanson Holdings Ltd (No. 2) [1971] 2 W.W.R. 506 (A.D.)

Consumers' Gas Co et al v Public Utilities Board and A.G.T. [1971] 3 W.W.R. 37 (A.D.)

Green et al v Public Utilities Board [instructive as to procedure] [1979] 2 W.W.R. 481

RECIPROCAL ENFORCEMENT OF JUDGMENTS ACT, R.S.A. 1970 c. 313

Application to register a foreign judgment in Alberta

Section 3. (1) Where a judgment has been given in a court in a reciprocating jurisdiction [not defined], the judgment creditor may apply to the Court of Queen's Bench within six years after the date of the judgment to have the judgment registered in that court, and on any such application the court may order the judgment to be registered accordingly.

(2) An order for registration under this Act may be made *ex parte* in any case in which the judgment debtor,

(*a*) was personally served with process in the original action, or

(*b*) though not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court,

and in which, under the laws of the country of the original court, the time within which an appeal may be made against the judgment has expired and no appeal is pending or an appeal has been made and has been dismissed.

(3) In a case to which subsection (2) applies, the application shall be accompanied by a certificate issued from the original court and under its seal and signed by a judge thereof or the clerk thereof.

(4) The certificate shall be in the form set out in the Schedule, or to the like effect, and shall set forth the particulars as to the matters therein mentioned.

(5) In a case to which subsection (2) does not apply, such notice of the application for the order as is required by the rules or as the judge deems sufficient shall be given to the judgment debtor.

(6) No order for registration shall be made if it is shown by the judgment debtor to the court to which application for registration is made that,

(*a*) the original court acted either

(i) without jurisdiction under the conflict of laws rules of the court to which application is made, or

(ii) without authority under the law of the original court to adjudicate concerning the cause of action or subject matter that resulted in the alleged judgment or concerning the person of the alleged judgment debtor,

or without such jurisdiction and without such authority, or

(*b*) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court, or

(*c*) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court, or

(*d*) the judgment was obtained by fraud, or

(*e*) an appeal is pending or the time within which an appeal may be taken has not expired, or

(*f*) the judgment was in respect of a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court, or

(*g*) the judgment debtor would have a good defence if an action were brought on the original judgment.

(7) Registration may be effected by filing the order and an exemplification or a certified copy of the judgment with the clerk of the court in which the order was made, whereupon the judgment shall be entered as a judgment of that court. [1958, c. 33, s. 3]

Currency

4. Where a judgment sought to be registered under this Act makes payable a sum of money expressed in a currency other than the currency of Canada, the clerk of the Court shall determine the equivalent of that sum in the currency of Canada on the basis of the rate of exchange prevailing at the date of the entry of the judgment in the original court, as ascertained from any branch of any chartered bank, and the registering court or the clerk, as the case may be, shall certify on the order for registration the sum so determined expressed in the currency of Canada and, upon its registration, the judgment shall be deemed to be a judgment for the sum so certified. [1958, c. 33, s. 4]

Translation

5. Where a judgment sought to be registered under this Act is in a language other than the English language, the judgment or the exemplification or certified copy thereof, as the case may be, shall have attached thereto for all purposes of this Act a translation in the English language approved by the court, and upon such approval being given the judgment shall be deemed to be in the English language. [1958, c. 33, s. 5]

Registration

6. Where a judgment is registered under this Act,

(*a*) the judgment, from the date of the registration, is of the same force and effect as if it had been a judgment given originally in the registering court on the date of the registration and proceedings may be taken thereon accordingly, except that where the registration is made pursuant to an *ex parte* order, no sale or other disposition of any property of the judgment debtor shall be made under the judgment before the expiration of the period fixed by section 7, subsection (1), clause (*b*) or such further period as the registering court may order, (*b*) the registering court has the same control and jurisdiction over the judgment as it has over judgments given by itself, and

(*c*) the reasonable costs of and incidental to the registration of the judgment, including the costs of obtaining an exemplification or certified copy thereof from the original court and of the application for registration, are recoverable in like manner as if they were sums payable under the judgment if such costs are taxed by the proper officer of the registering court and his certificate thereof is endorsed on the order for registration. [1958, c. 33, s. 6]

Registration

7. (1) Where a judgment is registered pursuant to an *ex parte* order,

(*a*) within one month after the registration or within such further period as the registering court may at any time order, notice of the registration shall be served upon the judgment debtor in the same manner as a statement of claim is required to be served, and

(*b*) the judgment debtor, within one month after he has had notice of the registration, may apply to the registering court to have the registration set aside.

(2) On such an application the court may set aside the registration upon any of the grounds mentioned in section 3, subsection (6) and upon such terms as the court thinks fit. [1958, c. 33, s. 7]

Practice and procedure

8. Rules of court may be made respecting the practice and procedure, including costs, in proceedings under this Act and, until rules are made under this section, the rules of the registering court, including rules as to costs, *mutatis mutandis*, apply. [1958, c. 33, s. 8]

Judge's powers

9. Subject to the Alberta Rules of Court any of the powers conferred by this Act on a court may be exercised by a judge of that court. [1958, c. 33, s. 9]

The Alberta Rules of Court 730-736 are specifically directed to applications under this Act. In this connection, see the judgment in Sanders v Nousek [1975] 3 W.W.R. 125 which underlines the necessity of complying with Rule 88.

The Rules of Court are reproduced infra.

RULES AS TO PRACTICE AND PROCEDURE MADE UNDER THE RECIPROCAL ENFORCEMENT OF JUDGMENTS ACT

Ex parte application

730. An *ex parte* application pursuant to section 3, subsection (2) of *The Reciprocal Enforcement of Judgments Act, 1958* for an order to register a judgment may be made without commencing proceedings by petition, originating notice, statement of claim or any other pleading.

Affidavit in support

732. Where proceedings are commenced by originating notice as required by Rule 731, the application shall be supported by an affidavit exhibiting an exemplification or certified copy of the judgment.

Style of cause

733. All pleadings under *The Reciprocal Enforcement of Judgments Act, 1958*, shall have a style of cause in the following form:

> "In the matter of *The Reciprocal Enforcement of Judgments Act* and in the matter of a judgment of (describe court) obtained by (describe the cause or matter) and dated the..................day of......................, 19.......".

Service of notice of registration

734. A notice of registration to be served on a judgment debtor pursuant to section 7, subsection (1) of the Act shall contain full particulars of the judgment registered and of the order for registration and shall

(*a*) state the name and address of the judgment creditor, or of his solicitor or agent, upon whom and where service of any notice issued by the judgment debtor may be served, and

(*b*) state that the judgment debtor, within one month after he has had notice of the registration, may apply to the registering court to have the registration set aside upon any of the grounds mentioned in subsection (6) of section 3 of the Act.

Setting aside

735. An application to have the registration of a judgment set aside shall be made by notice of motion.

Writ of execution

736. Where a writ of execution is issued on a judgment registered under the Act, the writ shall be varied by striking out the words "by a judgment of this court in this action, dated the .... day of ....", and by substituting the words "by a judgment of (describe court in which judgment was obtained) dated the............ day of.......................................and which judgment has been registered in this court pursuant to *The Reciprocal Enforcement of Judgments Act, 1958*".

CANADA

Province of..............
(*or as the case may be*)

Sched II
page 142B

This form (Schedule to the Act) is only used where the application for Registration is made ex parte.

ACT

(Section 3 (4))

CERTIFICATE

To all to whom these Presents shall come....GREETING:

It is hereby certified that, among the records enrolled in the court of................at................, before the Honourable................a Justice (Judge) of the said Court, in the Procedure Book there is record of an action, numbered as No.............

BETWEEN:

....

Plaintiff(s)

and

....

....

Defendant(s)

1. The writ of summons (statement of claim) (*or as the case may be*) was issued on the................day of .... 19.... and proof was furnished to this court that it was served on the defendant by delivery of a copy thereof to him and leaving it with him and exhibiting the original thereof to him at the time of the service.

2. No defence was entered, and the judgment was allowed by (proof, default, or order) ....
....

or

2. A defence was entered and judgment was allowed at the trial (*or as the case may be*)..................
....

3. Judgment was entered on the.................day of .... 19....

4. Time for appeal has expired and no appeal is pending (*or* An appeal against the judgment was made and was dismissed by the Court of Appeal and the time for any further appeal has expired and no further appeal is pending.)

5. Further details if any.

6. Particulars:

Claim	$
Costs to judgment	$
Subsequent costs	$
Interest	$
	$
Paid on	$
And the balance remaining due on said judgment for debt, interest and costs is the sum of	$

All and singular which premises by the tenor of these presents we have commanded to be certified.

IN TESTIMONY WHEREOF we have caused the Seal of our said Court at..............to be hereunto affixed.

WITNESS, The Honourable................a Justice (Judge) of our said Court at...................this ....day of................. 19.....

SEAL

A Justice (Judge) of the Court of
or
Clerk of the Court of
[1958, c. 33, Schedule]

(*NOTE: This Act is based on a model Act recommended by The Conference of Commissioners on Uniformity of Legislation in Canada.*)

[Reciprocal Enforcement of Judgments Act, R.S.A. 1970, c. 312]

The procedure, then, takes two directions: first, the application *ex parte* in which the applicant obtains a judgment and then serves notice thereof upon the judgment debtor who then has one month to apply to have the judgment set aside.

It is noteworthy that in *Alcor Pacific Lumber* v *Janet Lumber Trading* (1978) 11 A.R. 139, the Court held that failure by the Defendant to serve the Notice of Motion within the time limited by the Statute was fatal to his application to have the judgment set aside, although his arguments in favour of the motion might have been well received. The case is useful in any consideration of the section, and the authorities are carefully reviewed.

Wiegand et al v *Calgary Joint Ventures Limited* [1979] 2 W.W.R. 671 is another recent case of an application (this time successful) for setting aside a judgment registered under the Act pursuant to an *ex parte* application. The ground in *Wiegand* was that at the time the judgment was obtained against him, the defendant was not 'carrying on business or ordinarily resident' within the jurisdiction of the court. A list of the possible defences is obtainable from the text of the Act.

The second direction is charted in Rule 731 which reads

> 731. In a case to which 3(2) of the Act does not apply notice of the application shall be given to the judgment debtor by an originating notice.

Rule 732 applies to such applications.

In such a case, the judgment when approved by the Court may be entered without being subject to being opened up within the one-month period.

It is necessary to note carefully the Statute and the Rules, for the two procedures are dealt with simultaneously, and amongst the rules for obtaining enforcement one finds the rules for applying to have the judgment set aside.

RECIPROCAL MAINTENANCE ORDERS ACT, R.S.A. 1970 c. 313

Application for a maintenance order against a person residing in a reciprocating State (until confirmed, such Order provisional only).

Maintenance orders outside Alberta

5. (1) Where an application is made to a court in Alberta by a dependant who is resident in the Province, for a maintenance order against a person and it is proved that that person is resident in a reciprocating state, the court may, in the absence of that person and without service of notice on him, if after hearing the evidence it is satisfied of the justice of the application, make any maintenance order that it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but an order so made is provisional only and has no effect until it is confirmed by a competent court in the reciprocating state.

(2) Where the evidence of a witness who is examined on an application mentioned in subsection (1) is not taken in shorthand, the evidence shall be put into the form of a deposition, and the deposition shall be read over and signed by the witness and also by the judge or other person presiding at the hearing.

(3) Where an order has been made pursuant to subsection (1),

(*a*) the court shall prepare,

(i) a statement showing the grounds on which the making of the order might have been opposed if the person against whom the order was made had been duly served with a summons and had appeared at the hearing, and

(ii) a statement showing the information that the court possesses for facilitating the identification of the person against whom the order was made and ascertaining his whereabouts,

and

(*b*) the court shall send to the Attorney General for transmission to the proper officer of the reciprocating state,

(i) a certified copy of the order,

(ii) the depositions or a certified copy of the transcript of the evidence, and

(iii) the statements referred to in clause (*a*).

(4) Where a provisional order made under this section has come before a court in a reciprocating state for confirmation, and the order has by that court been remitted to the court in Alberta that made the order for the purpose of taking further evidence, the court in Alberta shall, after giving the notice prescribed by the rules, proceed to take the evidence in like manner, and subject to the like conditions, as the evidence in support of the original application.

(5) Where upon the hearing of the evidence taken under subsection (4) it appears to the court in Alberta that the order ought not to have been made, the court may rescind the order, but in any other case the depositions or a certified copy of the transcript of the evidence, if it was taken in shorthand, shall be sent to the Attorney General and dealt with in like manner as the depositions or transcript of the original evidence.

[Reciprocal Maintenance Orders Act, R.S.A. 1970, c. 313]

The Alberta case at the District Court level is Bodnar v Popovich, [1974] 3 W.W.R. 658 and there are no cases reported in the Court of Appeal. The Bodnar case holds

> A provisional order for maintenance under s. 5(1) may only be made in favour of a "dependant" as defined in s. 2. A child born out of wedlock is not a dependant of the putative father until an affiliation order has been made against him; thereafter, a maintenance order may issue. Where the putative father lives in another province and does not submit to the jurisdiction to which the mother is subject an affiliation order is a nullity in the province where the father resides and he may ignore it. A provisional maintenance order based upon such an affiliation order would have no substantive efficacy: ***Sirdal Gurdyal Singh v. Faridkote Rajah***, [1894] A.C. 670 applied.

and the same rule holds true in reciprocating jurisdictions

Confirmation of Maintenance Orders Made in Reciprocating States

Confirmation of order

6. (1) Where,

(*a*) a maintenance order has been made by a court in a reciprocating state and the order is provisional only and has no effect until confirmed by a court in Alberta,

(*b*) a certified copy of the order, together with the depositions of witnesses and a statement of the grounds on which the order might have been opposed if the person against whom the order was made had been a party to the proceedings, is received by the Attorney General, and

(*c*) it appears to the Attorney General that the person against whom the order was made is resident in Alberta,

the Attorney General may send the documents to a court designated by the Lieutenant Governor in Council as a court for the purposes of this section, and upon receipt of the documents the court shall issue a summons calling upon the person against whom the order was made to show cause why the order should not be confirmed, and cause it to be served upon such person.

(2) At a hearing under this section the person on whom the summons was served may raise any defence that he might have raised in the original proceedings if he had been a party thereto, but no other defence, and the statement from the court that made the provisional order, stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings, is conclusive evidence that those grounds are grounds on which objection may be taken.

(3) Where, at a hearing under this section, the person who was served with the summons does not appear or, having appeared, fails to satisfy the court that the order ought not to be confirmed, the court may confirm the order, either without modification or with such modifications as the court, after hearing the evidence, considers just.

REGISTERED DIETITIANS ASSOCIATION ACT, R.S.A. 1970 c. 313

Appeal from suspension or expulsion from the Association

Section 18. (1) Any member who has been expelled or suspended from the association may appeal from the order of the council to a judge of the Court of Queen's Bench at any time within fourteen days of the date of the order of expulsion or suspension, or within such further time as a judge of the Court of Queen's Bench may order.

There is no legislative sanction for evidence to be given which would not be acceptable in a Court, and evidence must be given before the Council under oath. (Section 17(2)(b))

There are no cases reported.
No originating document is prescribed in respect of the appeal.

REGISTERED NURSES ACT, R.S.A. 1970, c. 317

Appeal from suspension or expulsion from the Association

Section 10 (1) Where a member is suspended or expelled from membership in the Association or otherwise disciplined, the member may, on originating notice, appeal to the Court of Queen's Bench within thirty days or such further time as a judge allows.

(2) The proceedings on the appeal shall be in the nature of a rehearing on which the judge may make such order including an order as to costs as the justice of the case requires.

There are no cases reported.
An originating notice is prescribed, but no other directives are given other than the ukase in 10(2) that the appeal will be by way of hearing de novo. Semble, grounds for suspension will be found in the Bylaws.

RELIGIOUS SOCIETIES LANDS ACT, R.S.A. 1970, c. 319, amended S.A. 1973, c. 13, s.10(2)

Application for the Court's sanction for the sale of the lands of a Religious Society

Section 9 Before a transfer is executed pursuant to a public or private sale the religious society or congregation for whose use the land is held shall be notified and the sanction of a Judge of the Court of Queen's Bench shall be obtained for the execution of the transfer.

No cases.

[Religious Societies Lands Act, R.S.A. 1970, c. 319, amended s.a. 1973, c. 13, s. 10(2)].

Application for winding up a Religious Society

Section 27 (1) On the petition of any interested party a judge of the Court of Queen's Bench may order the winding up of any congregation incorporated under this Act for cause or on any grounds for which a company might be wound up by the Court under part 10 of The Companies Act.

(2) In considering a petition under this section the judge may direct that notice be given in any manner and to any persons that he considers appropriate.

(3) On hearing the petition the judge may
(a) appoint a person to wind up the affairs of the congregation and pay creditors and claimants thereof who are entitled thereto, and provide for the remuneration of that person and the payment of his expenses and other costs incidental to the winding up, out of the assets of the congregation or otherwise as he sees fit, or
(b) proceed in like manner as if a petition had been presented under The Companies Act for a winding up and the provisions of Part 10 of The Companies Act apply with all necessary modifications to the proceedings.

Application for Advice and Directions by a person appointed under (3) supra

Section 27 (4) A person appointed under subsection (3), clause (a) may at any time apply to a judge of the Court of Queen's Bench for directions or for the determination of any question arising with respect to his duties or for the exercise as respects any matter, of all or any of the powers that the Court of Queen's Bench might exercise if the congregation were a company being wound up by the Court, and the judge may give such directions, determine such question or make such order as he thinks just.

Application for an Order governing the disposition of the surplus.

Section 27 (5) [(a) provides that on winding up, the liquidator shall upon advertised notice, call a meeting to decide what shall be done with the surplus: i.e., to which charitable institution it shall be distributed] and failing this, if the members cannot agree
(b) may, where no resolution is passed pursuant to and in accordance with Claus (a), apply by originating notice of motion to the Court of Queen's Bench for an order governing the disposition

[Religious Societies Lands Act, R.S.A. 1970, c. 319, amended, S.A.1973, c. 13, s. 10(2)]

of the surplus and the judge hearing the application may make such order as he considers just, including an order directing that the surplus be vested in the ultimate heir under The Ultimate Heirs Act.

(6) An Order under ss (5)(b) vests all the estate and interest in the surplus assets in the ultimate heir as if the property had been received under the Ultimate Heir Act and the provisions of that Act apply thereafter with all necessary modifications.

THE SCHOOL ACT, R.S.A. 1970, c. 329

Appeal from the decision of a secretary of a school Board [who has declared a Petition insufficient] addressed to a Judge for an Order declaring the Petition sufficient.

3. (1) Where this Act provides for the doing of anything by Petition [the section provides for the formalities of the preparation of the Petition]

Section 4. (1) Each petition to a board shall be filed with the secretary of the board who shall, in accordance with section 3(3) compute the number of petitioners who have signed the petition and determine the sufficiency thereof.

...

(3) The petitioners may, in the event of the secretary declaring the petition to be insufficient, appeal to a judge within 14 days of the secretary's declaration, for an order declaring the petition sufficient.

The Act gives no information as to how one should proceed to lay the matter before the Judge: indeed, "judge" is not defined and one may conjecture that the intention is that the petition be presented to a Judge of the Court of Queen's Bench. Part 30 would seem to be indicated.

Application ex parte of an elector for an Order declaring a trustee to be disqualified to be a Trustee (mainly by reason of conflict of interest)

Section 35. (1) Upon the ex parte application of an elector who
(a) files an affidavit showing that a trustee never was or has ceased to be qualified to remain a trustee, and
(b) pays into court the sum of $50 as security for costs to abide the event of the application,
a judge of the Court of Queen's Bench may direct that there be served upon that trustee notice of an application for an order declaring him to be disqualified as a trustee.

[The School Act, R.S.A. 1970, c. 329]

(2) Upon hearing the application and such evidence either oral or by affidavit as he requires the judge may
  (a) declare the trustee to be disqualified or
  (b) refuse the order,
and in either case with or without costs.

The procedure set out in the Act is in fact that provided for in Part 30 of the Rules and would resolve itself into a preliminary application upon the basis of an affidavit and an Originating Notice embodying such directions for service as the Judge directs. The authorities are discussed in Morgan v Mierziewski, (1969) 71 W.W.R. 52: a judgment of Haddad, J., (as he then was) in the District Court. His Honour reviewed the authorities and it is a useful case. The case decides that the 'residence' qualification of a trustee is to be strictly construed and it means that the house in which the elector ordinarily lives must be within the geographical boundaries of the district: it is not sufficient that he should own land within those boundaries. There are no other recent cases reported.

THE SCHOOL ELECTION ACT, R.S.A. 1970, c. 331

Application for Recount [This application does not affect the remedy of an application for an Order in the nature of a Quo Warranto] (s. 135)

Section 122. (1) At any time within 15 days from the time of the declaration of the result of an election by the returning officer, any elector may apply to the Court of Queen's Bench by notice of motion for a recount, after the elector has
(a) filed an affidavit with the clerk of the court, that the returning officer or a deputy returning officer or other officer, in counting the votes given at the election improperly counted or rejected ballot papers, and
(b) deposited with the clerk of the court the sum of $300 as security for the payment of costs and expenses.

(2) The deposit of $300 shall not be paid out by the clerk without the order of the judge.

123. At least 3 days prior to the application, a copy of the notice of motion and the affidavit filed shall be served by the elector on the secretary of the board, the returning officer and all candidates or such candidates as the judge may direct.

124. Upon the hearing of the application the Judge shall appoint a time and place ...

No cases are reported, but see page 118, supra

THE SECURITIES ACT, R.S.A. 1970, c. 333

Application for directions regarding the disposition of funds.

The Securities Commission under the Act has wide powers to direct persons and corporations to hold funds during an investigation or pending or during a criminal proceeding. The person in receipt of such a direction may apply for directions as follows:

Section 26 (2) Any person or company in receipt of a direction given under ss (1), if in doubt as to the application of the direction to any funds or security or in the case of a claim being made thereto by any person or compaby not named in the direction, may apply to a judge of the Court of Queen's Bench who may direct the disposition of such funds or security and may make such order as to costs as seems just.

(6) Upon an application made under this section, the rules of practice of the Supreme Court apply.

Subsection (6) is not very clear: but Part 30 would seem to be indicated, especially as certainly the Court will direct service on the Commission of notice of the application.

No cases are reported.

There are a number of applications authorized under the Securities Act which are to be brought by the Commission, and these have not been included in this survey. They are probably of limited interest to a solicitor in general practice.
Appeals from a decision of the Commission are dealt with in Section 29. The appeal shall be by notice of motion mailed by DR mail to the Registrar of the Commission.

THE SEIZURES ACT, R.S.A. 1970, c. 338

Application for an Order for Sale of a Mortgage.

Section 9. No mortgage or other security for money seized under a Writ of Execution shall be sold except upon the order of a judge and then only upon such conditions as the judge thinks fit to prescribe.

No cases are reported. Clearly one would have to have a nulla bona before the application would be considered by a judge.

Application for an Order for Sale of Land notwithstanding that a year has not expired or notwithstanding that the Applicant is not armed with a Writ of Nulla Bona.

[Seizures Act, R.S.A. 1970, c. 338]

Section 15 (1) No sale of lands shall, unless a judge otherwise orders, be had under a writ of execution

(a) until after a return nulla bona in whole or in part and
(b) until after the expiration of one year from the date of the receipt by the Registrar of the appropriate Land Titles Office of the copy of the Writ of Execution.

(2) No lands shall be sold under a writ of execution until after the giving of such notice of the sale by advertising or otherwise as may be directed by a judge.

Although I can not give authority for this statement, the Alberta practice in respect of sale of land under execution is markedly similar to that which follows the Order Nisi in Foreclosure, and the material to be filed in support of the application is much the same as that to be filed in a Foreclosure action.

Application for an Order for Sale of chattels seized
- under Writ of Execution
- under Distress Warrant pursuant to
  The Garagemen's Lien Act
  The Conditional Sales Act
  any agreement for the rental of premises, subject to the terms of the Landlord and Tenant Act

where the Respondent has filed a Notice of Objection to the seizure.

Section 29 (1) Where the sheriff receives a notice of objection [to the seizure] he shall immediately notify the creditor and thereupon the creditor may from time to time apply by notice of motion to the court for an order for the removal and sale or for the removal or the sale of the property seized or any part thereof.

(2) Where a creditor applies pursuant to ss (1) the notice of motion shall, as far as is reasonably possible, specify and describe the particular property in respect of which the order is sought.

(3) Seven days' notice of any such application shall be given to the debtor, or such other notice as the court may direct.
[As to SERVICE, see s. 37: single-register]

(4) Every such application shall be dealt with in a summary manner and may be adjourned from time to time.

(5) Upon the hearing of the application the evidence may be taken either viva voce or by affidavit as the court may direct and the court

(a) may in its discretion eitherrefuse the application, or

[Seizures Act, R.S.A. 1970, c. 338]

(b) may in the order provide, with the consent of the creditor, where the goods seized are subject to a conditional sale agreement or are the goods to recover the price of which the seizure is made, that the goods be delivered up to the creditor in satisfaction of all sums payable under the sizure or such part thereof as the court deems proper,

(c) may make the order upon such terms and conditions as to costs or otherwise as it determines,

(d) may by the same order, or upon the application of the debtor by a subsequent order, suspend the operation of the order pending the payment of the debt by such instalments as the judge may fix, or the giving of such security or the performance of such other conditions as the court may impose, and

(e) may order the release of all or any part of the goods seized.

(6) Where the court orders a sale, it may give directions as to the manner, time and place of the sale and such other directions as to it seem proper and convenient, and may give leave to any party to bid or submit a tender, as the case may be, at the sale.

(7) An order made under this section shall as far as is reasonably possible specify and describe the particular property in respect of which the order is made.

(8) [S.A. 1978, c. 51, s. 38(56)(c)(iv)]
If on the hearing of an application under this section it appears that there is a dispute as to

(a) the right to make the seizure,
(b) the amount payable in respect of the seizure, or
(c) the ownership of the goods seized,

the court in its discretion may hear and determine the dispute in a summary manner upon the notice and to the persons that it may direct and upon either oral or affidavit evidence or both, as the Court considers appropriate.

(9) There is no appeal from an order of the Court except only where the indebtedness in question exceeds the sum of $500. and in that case an appeal lies to the Court of Appeal.

The question arises upon the 1978 amendment whether the legislature intended to restrict the jurisdiction of a Judge in chambers. It is not probable, but the alteration should be noted: previously the Act read: "The judge in his discretion ... (etc)]

[Seizures Act, R.S.A. 1970, c. 338]

As mentioned supra notice of the application must be given seven days before the date of the application (Section 29(3)) or as a court may direct, by Single-Registered Mail, with proof of service as set out in Section 37.

As to time of service (7 days) refer Rules of Court R. 546, 547 and ff.

Winnicky v Grande Prairie and District Savings and Credit Union Ltd. [1976] 1 W.W.R. 80 holds that a chattel mortgagor, to defeat a seizure by invoking the Exemptions Act, must show that the chattel in question was exempt, both at the date of the execution of the chattel mortgage and at the time of the seizure. The authorities are discussed.

[The Seizures Act, R.S.A. 1970, c. 338]

Application by creditor or debtor to the Court for directions

> Section 39 (2) At any time after a distress the creditor or debtor may upon his own motion apply to the court for directions with respect to the exercise or intended exercise by the sheriff of any of the powers, duties or authorities conferred upon the Sheriff by this Act.
>
> (3) Upon an application made under ss(1) [by the Sheriff] or (2), the court may, upon such notice to such parties as it thinks proper, and after hearing such evidence as it deems necessary, make an order giving such directions not inconsistent with this Act as in its absolute discretion it deems proper and convenient.

An application was made for directions in Light Well Services v Skytop Rig Company [1974] 4 W.W.R. 638 and the authorities are discussed on the point raised: the case is also instructive as to the procedure. The application was by notice of motion and the court discusses distress.

SOCIAL WORKERS ACT, R.S.A. 1970, c. 346

Appeal from an Order suspending the license of, or reprimanding, a Social Worker

Section 15 (1) Any accused person who has had an order made in respect of him under s. 14(1) [suspending, reprimanding a social worker] may appeal to the Court of Queen's Bench from the order.

(2) An appeal shall be commenced by originating notice of motion filed within 30 days from the date on which the order is made by the council.

(3) On the request of the accused person the registrar shall file a copy of the evidence taken at the hearing before the council with the clerk of the court for the judicial district in which the accused person resides.

(4) The Court on hearing the appeal may
  (a) quash or confirm the finding of guilt, or
  (b) quash or confirm the punishment imposed or order a different punishment,
and give such directions as to the costs of the appeal as seem just.

No cases. It would not appear that the legislature contemplated a hearing de novo, since no additional evidence is authorized to be presented upon the appeal.

SOCIETIES ACT, R.S.A. 1970 c. 347.

Application to enforce a decision made pursuant to an arbitration under the Act or Bylaws.

Section 22(1) The By-laws of a society may provide that a dispute arising out of the affairs of the society and between any members of the society or between
  (a) a member or a person who is aggrieved and who has for not more than six months ceased to be a member, or
  (b) a person claiming through the member or aggrieved person or claiming under the by-laws of the society,
and the society or a director or officer of the society, shall be decided by arbitration, which shall be under The Arbitration Act unless the by-laws prescribe some other method.

(2) A decision made pursuant to such arbitration is binding on all parties and may be enforced on application to the Court of Queen's Bench and unless the by-laws otherwise provide there is no appeal therefrom.

STRAY ANIMALS ACT, S.A. 1976, c. 52

Application for an Order to destroy a mischievous dog

Section 22. (1) Where a person believes that any other person owns or has in his possession a dog that within one month of the date of his application under this section has worried, injured or destroyed livestock or domestic fowl outside land owned or occupied by the owner or person in possession of the dog, he may apply to a provincial judge for an order that the dog be killed.

The statute fails to set out how one applies for such an order.

SURFACE RIGHTS ACT, S.A. 1972, c. 91

Appeal from an Order of the Surface Rights Board as to the amount of compensation payable to an owner.

Section 24 The Operator or any respondent named in a compensation order may appeal a compensation order to the Court of Queen's Bench as to the amount of compensation payable or the person to whom the compensation is payable or both.

. . .

(4) The party appealing shall,

(a) within 30 days after the date of the compensation order cause a notice of appeal to be filed in the office of the clerk of the Court of Queen's Bench in the judicial district in which the land is situated, and

(b) not later than 10 days after the filing of the notice of appeal, serve the Board and the other parties to the compensation order appealed from or their respective solicitors with a copy thereof, by personal service or by registered mail.

(5) The Board [shall transmit to the clerk of the court copies of the application, the order, the compensation order and the reasons of the Board]

(6)[The Clerk of the Court shall set down the appeal at the next sittings of the Queen's Bench and within 10 days after the appeal has been set down for hearing, notify the Board and parties at their addresses for service in the notice of appeal, by reg'd mail]

(7) An appeal to the Court of Queen's Bench shall be in the form of a new hearing.

(8) [powers of the Court]

(9) [Further appeal to the Court of Appeal, with leave]

(10) [Deals with costs]

[Surface Rights Act, S.A. 1972, c. 91]

The Cases:
Livingston v Siebens Oil and Gas Ltd (1978) 8 A.R. 439 (A.D.)
Roen v PanCanadian Petroleum Ltd (1977) 6 A.R. 70 (D.C.)
Voyager Petroleums v Spaulding (1977) 5 A.R. 302 (D.C.) /D.C.
B.P. Exploration Canada Ltd v Hagerman et al (1978) 12 A.R. 165
Twin Oils Ltd v Schmidt (1968) 74 W.W.R. 647 (D.C.)
Great Plains Development Co of Canada Ltd v Lyka et al [1973] 5 W.W.R. 768 (A.D.)
Alexandra Petroleums Ltd v Caswell [1972] 3 W.W.R. 706 (A.D.)
Libra Holdings v Westhill Resources Ltd (1978) 14 A.R. 529 (D.C.)
Hanen v Imperial Oil Enterprises Ltd (1978) 7 Alta L.R. (2d) 331 (D.C.)

SURVIVAL OF ACTIONS ACT, R.S.A. 1978 c. 35

Application for the appointment of an Administrator ad Litem

Section 8(1) If a cause of action survives under this Act and there is no personal representative of the deceased person against whom the action may be brought or continued in Alberta, the Court of Queen's Bench or the Surrogate Court of Alberta

(a) on the application of a person entitled to bring or to continue the action, and

(b) on such notice as the court considers proper,

may appoint an administrator ad litem of the estate of the deceased person and the action may be brought or continued against him and defended by him.

(2) An administrator ad litem appointed under ss (1) may take any steps that a defendant may take in an action, including third party proceedings and the bringing, by way of counter-claim, of any action that survives for the benefit of the estate of the deceased person.

(3) A judgment obtained by or against the administrator ad litem has the same effect as a judgment in favour of or against the deceased person or his personal representative, as the case may be, but it has no effect for or against the administrator ad litem in his personal capacity.

SURVIVAL OF ACTIONS ACT, S.A. 1978 Ch. 35

S. 8(1) Application for an Order appointing an Administrator ad Litem

Type 7 - Administrative Sanction

> 8(1) If a cause of action survives under this Act and there is no personal representative of the deceased person against whom the action may be brought or continued in Alberta, the ~~Supreme Court~~ of Alberta or the Surrogate Court of Alberta
> Court of Queen's Bench
>
> (a) on the application of a person entitled to bring or continue the action, and
>
> (b) on such notice as the court considers proper,
>
> may appoint an administrator *ad litem* of the estate of the deceased person and the action may be brought or continued against him and defended by him.
>
> (2) An administrator *ad litem* appointed under subsection (1) may take any steps that a defendant may take in an action, including third party proceedings and the bringing, by way of counterclaim, of any action that survives for the benefit of the estate of the deceased person.
>
> (3) A judgment obtained by or against the administrator *ad litem* has the same effect as a judgment in favour of or against the deceased person or his personal representative, as the case may be, but it has no effect for or against the administrator *ad litem* in his personal capacity.

Application will be brought under Part 30, for the Statute authorizes the Court to make an Order otherwise than in an action (and if there is no action instituted, then the application cannot be interlocutory).

Rules 394 and 395 of the Rules of Court will apply.

If the action has been brought before the death of the deceased, presumably the application may be brought as an interlocutory proceeding intituled in the action itself.

The cases under Section 54 of the Administration of Estates Act will apply to this subsection of the Survival of Actions Act.

The cases quoted are:
Bodnaruk v C.P.R. [1947] 1 W.W.R. 279
Alberta Appellate Division, wherein it was held

> A person appointed under Rule 63 (equivalent to our Rule 50) to represent the estate of a deceased person for the purposes of an action is not the administrator of the estate and therefore cannot maintain an action as Administrator under the Trustee Act or under the Fatal Accidents Act.

If the judgment in the Bodnaruk case is still good law insofar as it defines the parameters of Rule 50, it is submitted that Rule 50 is redundant: and an appointment of an Administrator ad Litem under Section 8(1) of the Survival of Actions Act would serve to provide the Estate, not only with an administrator for purposes of defence, but also for the necessary purpose of counterclaiming where required, upon behalf of the estate.

Farish and Ellison v Papp and Patterson
Re: Ellison and Hopping Estates (1957-58) 23 W. W. R. (NS) (2d) 690
Supreme Court of Alberta, (Riley, J.)

Plaintiffs were administrators of the Estate of Ellison, who was killed in a collision: the Defendants were administrators ad litem appointed under Rule 63 (now Rule 50). The Administrators ad litem counterclaimed and it was held that an appointment under the Rule did not entitle them to bring a counterclaim, which was, therefore, dismissed.

Riley, J., said

> The Rule on the face of it is very broad in its language. The order appointing Miles H. Patterson as a representative person is likewise broad. It is dated November 19, 1956, and the substantive provision read as follows:
>
> > "It is ordered that Miles H. Patterson, Barrister and Solicitor, of the City of Calgary, in the Province of Alberta, be and is hereby appointed as representative of the estate of William Alexander Hopping, deceased, to appear and act on behalf of the estate of the said deceased for all purposes in this proposed action."
>
> R. 63, however, is exactly the same R. 63 that was considered by the Appellate Division of the Supreme Court of Alberta in *Bodnaruk v. C.P.R.* [1947] 1 WWR 279. The court there held in respect of this very Rule (and I quote from the headnote):
>
> > "A person appointed under R. 63 to represent the estate of a deceased person for the purposes of an action is not the administrator of the estate and cannot therefore maintain an action as administrator under sec. 32 of *The Trustee Act,* RSA, 1942, ch. 215, or under *The Fatal Accidents Act,* RSA, 1942, ch. 125."
>
> Further reference should be made to *Abbott v. Browns* [1921] 1 WWR 1188, also a decision of the Alberta Appellate Division and the most instructive article by Bora Laskin in (1939) 17 *Can. Bar Review* 677. This article incidentally is referred to by the Appellate Division in the *Bodnaruk* case. It has been judicially determined as far as this province is concerned that the plaintiffs' action as constituted against Miles H. Patterson as administrator of Hopping's estate will not lie and that equally Miles H. Patterson's counterclaim as administrator of the estate of Hopping will also not lie.

> It is noted that in Ontario, for example, there is an express provision in *The Trustee Act*, RSO, 1950, ch. 400, clarifying the position of an administrator *ad litem*, and under sec. 2 (*a*) of that Act it is provided:
>
> > "(*a*) The administrator *ad litem* shall be deemed to be an administrator against whom an action may be brought . . . .
> >
> > "(*b*) Any judgment obtained by or against the administrator *ad litem* shall be of the same force and effect as a judgment in favour of or against the deceased person, as the case may be."
>
> It is perhaps unfortunate that similar legislation does not exist in this province.

Similar legislation does, of course, now exist in this Province and it is contained in The Survival of Actions Act, S.A. 1978, Ch. 35, Section 8(3).

The case of Weisbrod v The Public Trustee (1966) 56 W.W.R. 316, a judgment of Justice Milvain, is interesting only historically, for it was decided upon the basis of a Statute (Sections 33 and 33a of the Trustee Act, as they stood in 1966) and that statute then authorized the appointment of an Administrator Ad Litem where neither probate of a Will or administration of a deceased's estate had been granted in Alberta. An administrator of the Estate of one Drozd had been appointed, and then discharged: His Lordship declined to construe so narrowly the terms of the Statute as to find that an Administrator ad Litem could not now be appointed in order to permit an action by a plaintiff who, semble, had a good cause of action against Drozd, deceased.

Justice Milvain's judgment points up, however, the fact that an Administrator appointed under the Rules (see our Rule 50) could not counterclaim or in any way maintain an action upon behalf of the Estate. In order to give the Administrator suitable powers, it would be necessary that he be appointed under the Act: then, the Trustee Act and now the Survival of Actions Act. The power is specifically set out in Section 8(2) supra.

The final case on Administrator Ad Litem is
Bauer v Public Trustee and Portas (1977) 2 Alta L.R. (2d) 42
Appeal from an Order that the plaintiff be permitted to take the next step in an action: also for amendment of the style of cause to change the name of the Defendant's deceased. The Public Trustee had obtained an Order appointing that office as Administrator Ad Litem of the Estate of Marvin Hyland: 'for the purposes of representing the said Marvin Hyland, deceased, in an action to be commenced by Marvin Bauer concurrently with the filing of this Order'. The Statement of Claim was issued in October of 1974. In November, 1974, the father of the deceased took out Letters of Administration in the estate of Wayne Hyland. The Order appointing the

Public Trustee had been obtained in the wrong name.

The Master in Chambers held that the naming of "Marvin Hyland" rather than "Wayne Hyland" was a misnomer and could be corrected.

To quote from the judgment of D.C. McDonald, J.

> "Mr Abells submits that the statement of claim was a nullity. He relies on Buteau v Public Trustee for Alta., [1972] 2 W.W.R. 177, 24 D.L.R. (3d) 503 (Alta C.A.) However in that case the Master had not made the order appointing the Public Trustee Administrator ad litem until after the two-year limitation period had expired, and the action was therefore held by the Appellate Division of this court to have been improperly constituted. However, in the present case the Master's order was made before the expiry of the limitation period; the action was properly constituted, but the wrong name was given in the Order and therefore in the Statement of Claim.
>
> . . .
>
> (Quoting Spence, J. in Ladouceur v Howarth, [1974] S.C.R. 1111)
> "The general principle underlying all the cases is that the court should amend, where the opposite party has not been misled, or substantially injured by the error".

Amendment of the style of cause was therefore allowed.

THE TAX RECOVERY ACT, R.S.A. 1970 c. 360

Application to have a sale for taxes halted for non-compliance with Act

Section 26 At any time prior to the sale of any parcel, or its final acquisition by the municipality, which ever event first happens, any person interested in any parcel may apply in chambers to a judge of the Court of Queen's Bench.

(2) Upon the application [the Judge], if he is of the opinion that the provisions of this Act have not been complied with, may summarily make an order directed to the Registrar [of Land Titles] staying the issue of any certificate of title with respect to the parcel or the sale of the parcel, as the case may be, until the respective rights of the applicant and of the municipality have been determined by a declaratory order of the judge or until after the expiration of a period of 30 days or less, as fixed by his order.

(3) If the rights of the applicant and of the municipality are not so determined prior to the expiry of 30 days from the date of the staying order, or upon the expiry of the period fixed by the order, as the case may be, the order ceases to be of any effect and no further order shall be made.

[Tax Recovery Act, R.S.A. 1970 c. 360]

There are no cases reported under this section.

Application for payment out to the Applicant of surplus moneys after Tax Sale. The Court grants a "Declaration", not an order.

Section 28. (1) Any surplus moneys that may remain and any money accruing thereto after distribution of the proceeds of sale as directed by section 27 shall be paid into a separate tax sale trust account.

(2) The moneys paid into the tax sale trust account shall be paid out to the person or persons who
(a) apply to the Court of Queen's Bench within 10 years from
(i) the date of final acquisition or
(ii) the date of sale, if the parcel is sold prior to final acquisition
and
(b) are declared by the Court of Queen's Bench to be entitled to the surplus moneys paid into the tax sale trust account.

(3) The declaration of the judge of the Court of Queen's Bench may be made upon notice to such persons as the judge may direct and shall be disposed of summarily and any order so made has the same force and effect as an order of the Court of Queen's Bench.

(4) In making a declaration under this section the judge of the Court of Queen's Bench shall have regard to the priorities in which sale moneys would be distributed in a foreclosure action.

[There follows a saving clause: where the applicant has not made the application within the 10 year period, the Minister can extend the time]

Note that in support of an application for such a declaration it is necessary to submit to the Court an historical search of the property title from the date of the registration of the document under which the applicant claims, together with, obviously, G.R. search and (some judges prefer) Sheriff's certificate of no subsisting writs.

THE TRUST COMPANIES ACT, R.S.A. 1970 c. 372

On the filing of Accounts by a Trust Company for the approval of the Court, any person may be represented, though not entitled to notice.

Section 98 (1) In this section 'common trust fund' means a fund maintained by a company in which moneys belonging to various estates and trusts in its care are combined for the purpose of facilitating investment, but does not include deposits and investment moneys.

.....

(5) Not more than three years after the date on which a common trust fund is established, and triennially thereafter, the company maintaining the common trust fund shall file and pass an account of its dealings with respect thereto in the office of the Ct. of Queen's Bench in the judicial district in which the company maintains its head office or chief agency in Alberta, and a judge of the Court of Queen's Bench on the passing of the account has, subject to this section, the same duties and powers as in the case of the passing of executors' accounts.

(6) A company may at any time file and pass in the Court of Queen's Bench an account of its dealings with a common trust fund for any period of less than three years, but no subsequent accounting shall be required for a period of more than three years.

.....

(8) Upon the filing of an account pursuant to this section the judge of the Court of Queen's Bench shall appoint a time and place for the passing of the account, and the company shall cause a written notice of the appointment and a copy of the account to be served upon the Director [of Trust Companies] at least 14 days before the day appointed for the passing, and the company shall not be required to give any other notice of the appointment.

.....

(10) Upon the passing of an account pursuant to this section, the Director represents all persons having an interest in the funds invested in the common trust fund, but any person having an interest therein has the right at his own expense to appear personally or to be separately represented.

(11) Where an account filed pursuant to this section has been approved by a judge of the Court of Queen's Bench that approval, except so far as mistake or fraud is shown, is binding and conclusive upon all interested persons as to all matters shown in the account and as to the company's administration of the common trust fund for the period covered by the account.

No cases.

[The Trust Companies Act, R.S.A. 1970, c. 372, as amended]

Approval of Amalgamation Agreement

Section 139 provides for the Court of Queen's Bench to approve of an agreement between two or more Trust Companies to amalgamate and for this purpose prescribes a Petition for approving order.

There are no cases reported on the application.

Application by a Trust Company to the Court for adjudication as to the competing claims upon a share or obligation or upon a dividend, coupon or the proceeds thereof.

Section 41(1) Where the directors [of a Trust Company] entertain reasonable doubts as to the legality of any claim to or upon any share or obligation of a company, or to or upon any dividend, coupon or the proceeds thereof, the company, on the authorization of a resolution of the directors, may apply to the Court of Queen's Bench by originating notice of motion for an order or judgment adjudicating upon such claim and awarding such share, obligation, dividend, coupon or proceeds to the person legally entitled to it, and the Court may restrain any action or proceeding against the Company, or the directors or officers thereof, for the same subject matter, pending the determination of the motion.

This application brought by originating notice of motion is for the protection of the Trust Company; there is no requirement that the cestuis que trust be advised and no provision for their being represented.

There are no cases reported.

Application by the owner of capital shares in the Company requiring the Commission to commence or continue an action in the name of or upon behalf of the Company against an 'insider' to enforce a liability created by Section 76.

Section 76 provides that an 'insider' who makes use of information for his own benefit (thereby manipulating the price of shares to his advantage) must compensate 'any person', and

Section 77 provides for a judge of the Court of Queen's Bench, designated by the Chief Justice thereof, to hear an application by such person brought within 2 years after the date of the transaction, for an Order directing the Commission to prosecute or continue an action to recover against such 'insider'.

There are no cases on the section reported, and no prescribed initiating document.

[The Trust Companies Act, R.S.A. 1970, c. 372, as amended]

Application by a Shareholder for an Order enforcing the liability of Directors for losses sustained by the Company as a result of the making of unauthorized investments or loans

Section 133 (1) Upon the application to the Court of Queen's Bench by way of originating notice of motion by any shareholder of the company, a judge of the Court may, if he is satisfied that

(a) the shareholder has reasonable grounds for believing that the company has a cause of action under s. 132, and

(b) either

(i) the company has refused or failed to commence an action under s. 132 within 60 days after receipt of a written request from that shareholder to do so, or

(ii) the company has failed to prosecute diligently an action commenced by it under s. 132,

make an order, upon such terms as to security for costs and otherwise as to the judge seems fit, requiring the Attorney-General to commence or continue an action in the name of and on behalf of the company to enforce the liability created by s. 132.

Section 132 defines the liability of directors for unauthorized investments or loans.

No cases are reported under the section.

Order to deliver records

Section 88 provides that a person once employed by a Trust company may, at the petition of the company or of any depositor or interested person, on notice to the person concerned, be directed by the court to deliver up any book, record, money or security or thing that is the property of the Company.

No cases are reported.

Order to rectify register of Shareholders

Section 85 provides for an application by petition to the Court of Queen's Bench where the person aggrieved is without cause omitted from the register of shareholders of a trust company.

No cases are reported.

THE TRUSTEE ACT, R.S.A. 1970, c. 373

Application for an Order conferring power beyond that vested in the trustee by the trust instrument, for expedient transaction

Section 21 (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is expedient in the opinion of the Court of Queen's Bench or a surrogate court or a judge thereof, but it cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court or judge

(a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court or judge thinks fit, and

(b) may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2) The court or judge may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3) An application to the court or judge under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

No legislative direction as to the manner of bringing the application, and no cases are reported.

Application for variation of a trust or for the termination of a trust or for the approval of arrangements upon behalf of a contingent beneficiary.

Section 37 (1) In this section (a) "beneficiary," "beneficiaries", "Person" or "persons" includes charitable purposes and charitable institutions;

(b) "Court" means the Court of Queen's Bench

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising *after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the court.

*before or

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust whereunder the transfer or payment of the capital or of the income, including rents and profits

  (i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages, or

  (ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time, or

  (iii) is to be made by instalments, or

  (iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

  (i) by merger, however occurring;

  (ii) by consent of all the beneficiaries;

  (iii) by renunciation of his interest by any beneficiary so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts, or

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trusts, and who by reason of infancy or other incapacity is incapable of consenting, or

(b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, or

(c) any person who is a missing person (as defined in *The Public Trustee Act)* or who is unborn, or

(d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the court for approval it must have the consent in writing of all other persons who are beneficially interested under the trusts and who are capable of consenting thereto.

(7) The court shall not approve an arrangement unless it is satisfied that the carrying out thereof appears to be for the benefit of each person on behalf of whom the court may consent under subsection (5), and that in all the circumstances at the time of the application to the court the arrangement appears otherwise to be of a justifiable character.

(8) Where an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself unless the instrument shows an intention that he may so appoint.

(9) Where a will or other testamentary instrument contains no trust, but the court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of an infant or other incapacitated beneficiary that the court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the court has jurisdiction under this section to approve such an arrangement.

An application for variation of any trust must be made subject to the above section which was recast in 1973 and further modified in 1974. In Kinee v Public Trustee for Alberta (1977) 3 Alta L.R. (2d) 59, the Court pointed out that the Rule in Saunders v Vautier has been qualified, in the Province of Alberta, by Section 37 of the Trustee Act.

The application is authorized by Rule 410(h) to be brought by Originating Notice although Section 37 makes no mention of the Rules.

Application for Advice "in the manner prescribed by the Rules of Court"

Section 38. (1) Any trustee may apply in court or in chambers in the manner prescribed by rules of court for the opinion, advice or direction of a judge of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

[The reference is doubtless to 410(f) of the Rules of Court]

(2) The trustee acting upon the opinion, advice or direction

[The Trustee Act, R.S.A. 1970, c. 373]

given by the judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in respect of the subject matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction aforesaid if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

Advice and Directions in this context extends to the construction of a Will and to the consideration by the Court of a series of Wills for the purpose of determining which of them constitutes the last Will and Testament of a deceased, in a proceeding taken in Chambers and commenced by Originating Notice.

Two fairly recent cases are instances of applications under this section:
Re Haverland, [1975] 4 W.W.R. 673 and
Brice et Al v Brice and Public Trustee for Alberta [1971] 1 W.W.R. 481.
See also Canadian Court Forms, p.174 [2nd]

Application for the appointment of a judicial trustee

Section 42 (1) Application may be made to the Court of Queen's Bench or a surrogate court, having regard to the value of the property in question, or a judge thereof by or on behalf of the person creating or intending to create a trust or by or on behalf of a trustee or beneficiary or by any person interested in the trust or the trust property or in the administration or realization of the trust property either as a creditor or otherwise, and on such application the court or a judge may in his or its discretion appoint a person, in this Act called a judicial trustee, to be a trustee of the trust either jointly with any other person or as sole trustee, and if sufficient cause is shown in place of all or any existing trustees.

[the remainder of the section is relevant, although minimally relevant to the bringing of the application]

UNCONSCIONABLE TRANSACTIONS ACT, R.S.A. 1970 c. 377

Application by a debtor for the setting aside, whether in whole or in part, of a transaction upon the grounds that the cost of loan is unconscionable.

Section 3 Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may

(a) reopen the transaction, take an account between the creditor and the debtor, and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;

(b) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;

(c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;

(d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor;

Section 4. The powers conferred by section 3 may be exercised

(a) in an action by a creditor [by counterclaim?]

(b) in an action or upon an originating notice of motion brought by the debtor, notwithstanding any provision or agreement to the contrary, and notwithstanding that the time for repayment of the loan or any instalment thereof has not arrived ...

The Act specifically permits a debtor to proceed by Originating Notice (S. 4(b)) but there are no cases upon the application reported. There is, however, a case reported in 1978 which is of interest not only because it contains a judicial statement respecting unconscionable transactions, but also because it contains a statement of urgent interest to the profession regarding what constitutes professional duty to a client.

The Court found that 30% on a reasonably secure investment was unconscionable: the lawyer acting for the lender failed to adequately secure the lender, however, and did not advise him of the terms of the Unconscionable Transactions Act. The benefit of the Act was not available to the lawyer, who was held liable to repay to the client the principal sum with interest at 30% per annum.

THE UNFAIR TRADE PRACTICES ACT, S.A. 1975 c. 33

Application by a supplier to the Court for an order terminating an undertaking not to engage in an unfair trade practice.

Supplier's undertakings

10. (1) Where

(a) a supplier has engaged in or has been engaging in an unfair act or practice, and

(b) that supplier has satisfied the Director that he has ceased engaging in that act or practice,

that supplier may enter into an undertaking with the Director in such form and containing such provisions as the Director, upon negotiation with that supplier, considers proper and without restricting the generality of the foregoing, the undertaking may contain specific undertakings by the supplier

(c) to refrain from engaging in those acts or practices that were unfair, and

(d) to redress those consumers who suffered damage or loss due to those unfair acts or practices.

(2) Any time after a supplier enters into an undertaking he may request the Director to vary or terminate that undertaking and upon considering the request the Director may vary or terminate that undertaking.

(3) Notwithstanding subsection (2), any time after a supplier has entered into an undertaking he may apply to a court by way of originating notice for an order

(a) terminating that undertaking, where the court is satisfied that the act or practice that the supplier undertook to refrain from engaging in was not unfair, or

(b) varying the provisions of that undertaking, where the court is satisfied that the circumstances warrant varying the provisions of that undertaking.

(4) Where an undertaking is terminated or varied under this section, that termination or variance does not invalidate anything done under that undertaking prior to the termination or variance of that underaking.

(5) The Director shall maintain a public record of all undertakings entered into under this section.

The application is of very limited importance and the consumer who wishes to advert to the Act does so either by advising the Director of the existence of the trade practice or by bringing an action by Statement of Claim.
There are no cases reported.

VETERINARY SURGEONS ACT, R.S.A. 1970, c. 382

Appeal by Veterinary Surgeon from suspension, fine or removal from the Register.

Section 15 (1) Any person

(a) whose name has been erased from the register, or

[Veterinary Surgeons Act, R.S.A. 1970, c. 382]

(b) who has been suspended from practice, or
(c) who has been fined,

may appeal from such order to a judge of the Court of Queen's Bench at any time within six months from the date of the service of the order of the council upon him.

(2) Notice of any such appeal shall be filed in the office of the Court of Queen's Bench within the required time and a copy thereof served upon the registrar[of the association]

(3) The registrar, after the service of notice of appeal and upon request, shall furnish to the appellant a copy of all documents required to be considered by the judge.

Section 16 sets out what the judge shall consider: i.e.,
the proceedings before the council and the evidence taken,
the report of the council
the order of the council certified by the president or registrar.

The court may receive further evidence either orally or by affidavit and he may confirm the order or restore the member to the practice of the profession.

No cases.

VITAL STATISTICS ACT, R.S.A. 1970, c. 384, s. 35.

Appeal from the refusal of the Director of Vital Statistics to register a birth, stillbirth, marriage or death.

Section 35 Where an application for the registration of a birth, stillbirth, marriage or death is refused by the Director, if within one year of the refusal an application is made to a judge of the Court of Queen's Bench, the judge, upon being satisfied as to the good faith of the application and as to the truth and sufficiency of the evidence adduced on the application, and having regard to the standards respecting delayed registration set forth in the regulations for the guidance of the Director, may make an order requiring the Director to accept the application and register the birth, stillbirth, marriage or death.

(2) The clerk of the court shall forthwith send a copy of the order to the Director who shall comply with the order and attach the copy to the registration.

(3) Where an application for a certificate or a search in respect of the registration of a birth, stillbirth, marriage or death is refused by the Director, if, within one year of the refusal, application is made to a judge of the Court of Queen's Bench, the judge, upon being satisfied that the application

is made in good faith and that the applicant has good reason for requiring the certificate or search, may make an order requiring the Director to issue the certificate or make the search; and the Clerk of the Court shall forthwith forward a copy of the order to the Director, who shall comply therewith.

(4) Where the Director has made an order under section 22, any person interested may, within one year thereafter, appeal therefrom to a judge of the district court, and the judge may make an order confirming or setting aside the order of the Director and the order of the judge is final and binding on the Director.

[Section 22 refers to a notation made upon a registration by the Director, pursuant to a representation made to him that the registration was fraudulent]

(5) At least thirty days' notice of the application or appeal shall be served upon the Director.

No applications are reported. The Statute does not state how the application is to be brought, but thirty days notice is prescribed: semble, the application would be brought under Part 30 for directions and the judge, having regard to the provisions for notice set out in the statute, might indicate what evidence he wished to have adduced upon the hearing of the application. There would not seem to be any means of avoiding two appearances in Chambers, if one follows the procedure set out in the Rules.

WAREHOUSE RECEIPTS ACT, R.S.A. 1970, c. 386.

Application, where a negotiable receipt has been lost or destroyed, for a direction for the delivery of goods to the purchaser upon delivery of a bond.

Section 10. (1) Where a negotiable receipt has been lost or destroyed a judge of the Court of Queen's Bench

(a) upon application after notice to the warehouseman by the person lawfully entitled to possession of the goods, and

(b) upon satisfactory proof of such loss or destruction

may order the delivery of the goods upon the giving of a bond, with sufficient sureties to be approved in accordance with the practice of the court, to indemnify the warehouseman against any liability, cost or expense he may be under or be put to by reason of the original receipt remaining outstanding.

[Warehouse Receipts Act, R.S.A. 1970, c. 386]

(2) In any such case the warehouseman is entitled to his costs of the application.

No cases are reported. The procedure is not defined.

Interpleader proceedings are authorized by Section 11 of this Act, where a Warehouseman is faced with conflicting claims to goods or has notice of them: there are 10 days' grace during which he may retain the goods and commence interpleader proceedings.

WAREHOUSEMAN'S LIEN ACT, R.S.A. 1970, c. 386

Application for directions as to the disposition of sums surplus to the amount owing on a Warehouseman's Lien.

Section 8(3) [After providing in detail for the procedure to be followed where the Warehouseman has a lien for storage against goods left with him and not paid for]

if the surplus is not within 10 days after the sale demanded by the person entitled thereto, or if there are different claimants or the rights to the surplus are uncertain, the warehouseman shall upon the order of a judge pay the surplus into the Supreme Court.

(4) The order may be made ex parte upon such terms and conditions as to costs and otherwise as the judge may direct, and may provide to what fund or name the amount of the surplus is to be credited.

(5) At the time of paying the amount of the surplus into Court the warehouseman shall file in court a copy of the statement of account showing how the amount has been computed.

WOODMEN'S LIEN ACT, R.S.A. 1970, c. 396.

The procedure under the Woodmen's Lien Act is set out in the Act and is, like the Builder's Lien Act, a special and distinct procedure which must be followed to the letter. The action is commenced by Statement of Claim (after the claimant has filled out the forms which he must prepare to comply with the statute), but there is provision for summary disposal of the case (Section 11) and for applications to set aside the attachment or seizure that has been effected under the Act (Section 12).

APPLICATIONS UNDER THE RULES OF COURT

It would appear that originally all matters brought before the Court or raised in Chambers by Originating Notice were authorized by statute (vide the Annual Practice, 1910, Vol. 1 page 779 and ff.). This would appear to be no longer the case: there are applications now permitted by our Rules of Court which do not originate in any statute. Some of these, (e.g., Rule 297) were copied from the English rules and they, in turn, were initially authorized by an Act of Parliament. The Act, in the case of Rule 297 and its English predecessor, has now been repealed: and in any case the English procedure called for Statement of Claim: not originating notice.

Some of the more recent additions to the authorized motions under the Alberta Rules have not been added pursuant to any statute. Rule 410(e) is a relatively new addition and it sprang full-blown, so to speak, into the Rules of Court where it has been used rather more frequently than most. Generally speaking, however, the Court has maintained that the summary procedure is only to be employed where either statutory authority exists or the Rules permit and Justice Primrose in Re Red Deer College Inquiry [1973] 2 W.W.R. 222, dismissed the application on the basis that the same did not fall squarely within the provisions of the Rules of Court and there was no authority for asking for the Order in question, by Originating Notice.

RULES OF COURT, Rule 297

Application for perpetuating testimony

> Rule 297 (1) Any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of that event, may apply to the court by originating notice for an order to perpetuate any testimony which may be material for establishing his right or claim.
>
> (2) The originating notice shall be served on such parties as the court on ex parte application directs.
>
> (3) The evidence shall be taken in such manner as the court orders and then filed with the clerk.

There are no cases reported on this rule and there is no similar rule in the Alberta Evidence Act. The rule has evidently been copied from the English Practice and the following is the text of Rule 35 from the Annual Practice, 1910 (Volume I, page 559)

> 35. Any person who would under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

This and the rules which immediately follow it are from 5 & 6 Vict c 69, ss.1 and 2, now repealed (46 & 47 Vict c 49)
"Right or Claim, &c" -- the Court has a discretion as to making an order for examination of witnesses under this r. (West v Sackville, (1903) 2 Ch 378 (C.A.)
Where a question is raised during the lifetime of a lunatic as to the legitimacy of a child of his wife's, see, as to the proper mode of instituting a suit to perpetuate testimony with reference to that question, Re Stoer, 9 P.D. 120

As to suits to perpetuate testimony see further Story's Equity Jurisprudence, sec. 1505, 1512.

The English procedure was similar: the Annual Practice goes on to point out that the matter shall not be brought to trial, although the application is (semble) brought by Statement of Claim. Our Rules provide for what is, in essence, a Part 30 Application.

RULES OF COURT, Rule 383 (1)

Motion to set aside conveyance of property to defraud creditors

383. (1) Where it is alleged that there has been a conveyance of property to delay, hinder or defraud creditors or a creditor it is not necessary to commence an action to set aside the conveyance but the court may, on motion by the judgment creditor served upon the judgment debtor and upon the persons to whom it is alleged the property was conveyed, order the property or part thereof sold to realize the amount to be levied under execution.

. . .

(3) Upon the return of a motion under this Rule the court may
- (a) determine the matter summarily, or
- (b) direct the trial of an issue to determine any question or questions.

(4) Pending the hearing of the motion or trial of the issue the Court may grant an interim injunction to prevent the transfer or disposition of the property or interest therein or may appoint an interim receiver of the property or interest therein.

The text of the Rule would lead one to believe that the intent of the Rules Committee was to have the proceeding begun by Notice of Motion. Query whether the proceeding could be set aside for failure of the applicant to comply with Rule 89.

A judgment of Justice Steer: Faulhaber v Ulseth reported at [1976] 4 W.W.R. 48; 66 D.L.R. 488, reminds us that this application to set aside a conveyance of property upon the basis that it was made to delay, hinder or defraud creditors is not the same as an action under An Act Against Fraudulent Deeds, Gifts, Alienations, etc. 1571, c. 5. Under the Rule a creditor must exist at the time the conveyance complained of was made. The creditor, says Steer, J., must establish that a conveyance was made with intent to delay, hinder or defraud the creditor. The judge pointed out that a person suing in tort is not a creditor until he obtains judgment: but according to this judgment a creditor in respect of a liquidated demand should not have to await judgment to qualify as a 'creditor'.
See also C.E.D. (West., 2nd Ed.) 'Fraudulent Conveyances'; ss. 26, 27.

RULES OF COURT, Rule 383(2)

EQUITABLE EXECUTION

383. (2) Where a judgment debtor has an interest in land which cannot be sold under legal process, but can be rendered available by proceedings for equitable execution by sale for satisfaction of the judgment, the court may, upon motion served upon such persons as may be directed, order the land or the interest therein or a part thereof sold to realize the amount to be levied under execution.

(3) Upon the return of a motion under this Rule the court may

(a) determine the matter summarily, or

(b) direct the trial of an issue to determine any question or questions.

(4) Pending the hearing of the motion or trial of the issue the court may grant an interim injunction to prevent the transfer or disposition of the property or interest therein or may appoint an interim receiver of the property or interest therein.

RULES OF COURT - Applications for possession of Land (Rule 410(a))

Rule 410(a) of the Supreme Court Rules provides that proceedings may be commenced by Originating Notice in the following cases:
(a) proceedings to recover possession of land;

This rule derives from the English rules of the Supreme Court, 1883 and specifically from Order III, Rule 6 which reads as follows:

> 6. In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note or cheque or other simple contract debt); or (B), on a bond or contract under seal for payment of a liquidated amount of money; or (C) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (D) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E) on a trust; or (F) *in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant*; the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of the Forms in Appendix C., sec. IV, as shall be applicable to the case. (italics supplied).

The rule was considered by the Court of Appeal in *Casey* v *Hellyer* (1886) 17 Q.B.D. 97, 55 L.J.Q.B. 207 and Lord Esher M.R., after considering the rule in context, came to the following conclusion: that the simplified procedure

> was intended to [apply to] only the most simple cases between landlord and tenant, where it is unnecessary to prove devolution of title, at least on the part of the plaintiff, as, for instance, where a plaintiff claims to enter under the terms of a lease or agreement granted by himself, or where the defendant has attorned to the plaintiff by payment of rent, or is otherwise estopped from denying the plaintiff's title.

In *Casey* v *Hellyer* the original landlord had died and the action was brought by the receiver of his real estate appointed by the Court, and by the devisees under the will, and by an assignee of one of the devisees.

The Northwest Territories Ordinance which, in 1905, governed the procedure in Alberta, incorporated the English practice in the following terms:

> [section] 469 - Proceedings commenced by originating summons in the Supreme Court of Judicature in England may be so commenced under this ordinance unless otherwise provided and proceedings by a landlord to recover possession of demised premises from an overholding tenant may be so commenced.

On the basis of the above rule, in Porter v Rooney (1908) 8 W.L.R 289 it was held that the simple procedure applied only to cases in which the relation of landlord and tenant had existed, at some time or other, between the parties (at page 293 of the judgment); the application was refused on the grounds that the applicant was the purchaser by agreement for sale from the original lessor. No direct relation between the parties existed or ever had existed at the date of the application. Stuart, J., quotes Casey v Hellyer and adopts the reasoning therein contained.

The effect of these decisions is to deny to any person other than the landlord himself (even, perhaps, to his executor) the privilege of applying for possession of land under the simplified procedure.

In the Alberta Rules of Court authorized by Order-in-Council in 1914, the wording of the rule was altered and we find the following:

> 432. Proceedings may be commenced by originating notice in the following cases:
>
> (a) proceedings to recover possession of land;
> (b) proceedings for foreclosure, sale or redemption under a mortgage or lien.

It was while this version of the rule was in force that Jackson DCJ wrote his imaginative judgment in Resch v Glasser (1941) 3 W.W.R. 509. Resch was the purchaser under an Agreement for Sale of lands, the subject of the lease in question. No relationship of landlord and tenant existed, or had ever existed, between the parties to the proceedings and clearly, upon the basis of Porter v Rooney the application ought to have been dismissed. His Honour, however, did not feel bound by the Order of a single Supreme Court Justice sitting in Chambers and he felt further justified in his view because of the alteration in the wording of the rule in 1914. His Honour pointed out in his judgment that the rule was now shortened to provide for proceedings for recovery of possession without qualification and (at page 511) .. " does not restrict the right to landlords but is very general in its application". His Honour does not appear to have addressed his mind to the logical consequence of the use in the rule of the word "recover" rather than "obtain" which logically would lead one to the conclusion that the rule contemplated proceedings being brought by one who had, at some previous date, had lawful possession of the premises in question.

Resch v *Glasser* did not go to appeal and it stands in the Law Reports as an interesting aberration. Shortly thereafter, in 1945, in *Horspool* v *Anderson* [1945] 2 W.W.R. 433 at 445 the Court of Appeal dealt with the point although, unfortunately, not by way of *ratio*. In Supreme Court Chambers it had been held that the fact that the landlord (applicant) had sold his land did not derogate from his right to bring an application for possession and Ford, J.A., on appeal says unequivocally "the respondent [lessor] alone can give the notice [to quit] and .. he alone has the right of re-entry".* This would seem to lay to rest the imaginative reasoning of Judge Jackson in *Resch* v *Glasser* and leave us with the result successfully contended for in *Casey* v *Hellyer*: indeed it is interesting to note that the effect of the *Landlord and Tenant Act* (1978) is to restore the right of the landlord, in a simple case, to apply by a summary procedure for possession and for any rental remaining due.

This being so, one asks oneself, what is the effect, if any, of rule 410(a)? With respect, it is submitted that it has no effect whatever and should be stricken from the rules as redundant.

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* to the same effect, Stockford & Jackson v Willow Creek Holding Co. Ltd., [1938] 4 D.L.R. 792 Alberta Supreme Court Howson, J.

proceedings for the determination of any question where there are no material facts in dispute and the rights of the parties depend upon the construction of

(i) a written instrument, or
(ii) a statute or order-in-council or a regulation,

and for a declaration of the rights of the persons interested.

[See DECLARATORY JUDGMENT, Allan Findlay, Q.C., Law Society of Upper Canada Special Lectures, 1961, page 183]

The Rule was considered in Calford Properties Ltd v Kelly's Billiards Ltd [1973] 4 W.W.R. 532.
This was an application under the rule for a declaration as to the enforceability of a clause in a lease. A preliminary objection was taken that, the term of the lease not having expired, the question was academic. Cases are cited (page 533); but Kirby, J. rejected this view. Although His Lordship agreed that declarations upon matters which are to arise only in the future should be made sparingly, this question would, His Lordship pointed out, inevitably arise in the future and it was of practical importance that it now be answered.

Rule 410(e)(ii) - in Vladicka v Board of School Trustees of Calgary School ;District No. 19 [1974] 4 W.W.R. 159 it was held that an applicant may apply by originating notice for a determination of the rights of interested parties under a statute without joining the Attorney-General and without permission of the Lieutenant-Governor in Council.

In In Re: Edmonton School District No. 7 and A.T.A. the Edmonton School District applied to the Supreme Court for the determination of a question of law. The application is of interest because the application was considered by Miller, J. in depth and it illustates the circumstances in which the application is appropriate. The pleadings are doubtless of value as precedent.

And see also the judgment of Moir, J.A., in Ulster Petroleums Ltd v Pan-Alberta Gas Ltd (unreported) referred to in the text, supra, at page 7, Note (10), which permits of a very restrictive interpretation of the Rule.

CERTIORARI

See Rules 742 to 744.

But failure to bring an application within the time is not necessarily fatal:

see Sommers v City of Edmonton et al,
(Alberta Supreme Court, T.D., Miller, J.) 72 DLR (2d) 370 at 382

> The remaining question left to consider is whether the remedy of a declaratory judgment sought by the plaintiff is a proper remedy and is open to the Court to grant in this case. As part of its argument, the city alleges that, if the plaintiff felt the city or the appeal tribunals had erred, his proper remedy was by way of *certiorari* and that this procedure must have been commenced, as set out in Rule 742 of the Rules of Court, within six months after the judgment, order, warrant, or inquiry to which it relates. Having failed to pursue the proper remedy, the plaintiff seeks to do indirectly, by declaratory judgment, what he cannot now do directly by *certiorari*, due to the lapse of time.
>
> The power of the Courts to grant a declaratory judgment is given by the *Judicature Act*, R.S.A. 1970, c. 193, in s. 32(*p*), which says:
>
> > (*p*) no action or proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed;
>
> The question of when a Court should use the remedy of declaratory judgment was considered in *Klymchuk v. Cowan* (1964), 45 D.L.R. (2d) 587, 47 W.W.R. 467, a decision of the Court of Queen's Bench of Manitoba, when Smith, J., commenting on the equivalent Manitoba provision, said at pp. 589-90:
>
> > This subsection is exactly the same as the English O.25, r. 5, which was made in 1883. The language used obviously makes possible a very wide application of the declaration as a judicial remedy. It is a remedy within the discretion of the court. In England the Rule did not, at first, lead to any great extension of the types of cases in which a declaration might be obtained, and the Courts have generally declined to give a declaratory judgment where another established form of relief that affords the full remedy is available. Nevertheless, in spite of repeated judicial warnings that the Court's discretion should be exercised with caution, there has been in practice an increasing use of the declaratory judgment.
>
> As to whether the Court can still use a declaratory judgment when *certiorari* could or should have been used I would refer to the case of *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government et al.*, [1959] 3 All E.R. 1 at p. 8, a decision of the House of Lords where Lord Goddard stated:
>
> > I know of no authority for saying that, if an order or decision can be attacked by certiorari, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive though, no doubt, there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.
>
> In *Cooper v. Wilson*, [1937] 2 K.B. 309, Lord Justice Greer said at page 321:
>
> > . . . nor do I think that the power which he undoubtedly possessed of obtaining a writ of certiorari to quash the order for his dismissal prevents his application to the court for a declaration as to the invalidity of the order of dismissal.

In *Barnard et al. v. National Dock Labour Board*, [1953] 2 Q.B. 18, the plaintiffs sued for a declaration that they had been wrongfully dismissed. The plaintiffs did not know of the illegality until it was too late to apply for a *certiorari*. The Court of Appeal granted the declaration.

In Alberta the matter was considered in the case of *Driver Salesmen, Plant Warehouse & Cannery Employees, Local Union No. 987 of Alberta v. Board of Industrial Relations* (1967), 61 W.W.R. 484, in a judgment by Riley, J., where he stated at p. 489:

> The prevailing view is that it ought not to make any difference to the courts, through which door the plaintiff enters. A substantial amount of judicial support is found for the proposition that an action for a declaration is *prima facie*, an appropriate alternative remedy to certiorari to quash for want of jurisdiction.

and at p. 492 another quote from the same case by Riley, J.:

> The following Alberta cases are additional support for the proposition that a declaration is an effective alternative remedy to certiorari in this province: *Kettenbach Farms Ltd. v. Hinkey* [1937] 3 WWR 703; *McKerracher v. Manufacturers Life Insur. Co. and Board of Review* [1941] 1 WWR 509; *Westeel Rosco v. Board of Industrial Relations* (1967) 59 WWR 428.

In view of these decisions, I am of the opinion that this is indeed a case where the Court should exercise its supervisory jurisdiction and find that the plaintiff is not estopped from seeking a possible remedy by way of a declaratory judgment even though he could have used the prerogative writ of *certiorari* and is now out of time to use the same and further that I should exercise my discretion by way of a declaratory judgment.

In making use of the remedy of declaratory judgment I am mindful of the parameters governing the same which were well expressed by Viscount Radcliffe in *Ibeneweka v. Egbuna*, [1964] 1 W.L.R. 219 at pp. 224-5:

> Much has been said in various reported judgments about the nature of the power thus vested in the court, but none of these observations detracts from the two primary considerations, that the power to make declarations is conferred, surely not by accident, in wide and general terms, and that what is conferred is a discretion to be exercised according to the facts of each individual case.
>
> The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised "sparingly," with "great care and jealousy," with "extreme caution," with "the utmost caution." These are indeed counsels of moderation, even though as, Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciations of legal principle as administrative cautions issued by eminent and prudent judges to their, possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration. "In my opinion," said Lord Sterndale M.R. in *Hanson v. Radcliffe U.D.C.*, [1922] 2 Ch. 490, 507; 38 T.L.R. 667, C.A., "under Order 25, r. 5, the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide."

CERTIORARI continued

and see the judgment of Milvain, C. J. T. D. in

Board of Governors of Mount Royal College v Board of Industrial Relations of Alberta and Mount Royal Non-Academic Staff Association [1974] 6 W. W. R. 647 (Alberta Supreme Court)

where His Lordship points out that 24(2) of the Judicature Act which states that where the relief claimed is a injunction interfering with the doing of an act authorized by statute .. an action may not be brought without the consent of the Lt-Gov in Council.
But the Rules of Court say that an 'action' is commenced by
- originating notice
- petition or
- statement of claim;

and because the application is by Notice of Motion 24(2) of the Judicature Act does not apply.

See infra, page 14A

But see In re: Red Deer College Inquiry [1973] 2 W. W. R. 222 where Primrose, J., dismissed an application for Certiorari brought by Notice of Motion because of 24(2) and His Lordship failed to make any distinction between a Notice of Motion and an 'action'.

In Woodward Stores (Westmount) Limited v Alberta Assessment Appeal Board Division No. 1 and City of Edmonton; Southgate Shopping Centre Limited v Alberta Assessment Appeal Board Division No. 1 and City of Edmonton; Woodward Stores (Edmonton) Limited v Alberta Assessment Appeal Board Division No. 1 and City of Edmonton [1976] 5 W.W.R. 496 at page 505 of the judgment of D.C. McDonald, J., there is a fine essay on the principles to be applied by the court in an application for certiorari: His Lordship speaks, in part, as follows:

> It cannot be said that a wrong basis has been used by the Board, or, in other words, that there has been an error of law.
>
> Before leaving my consideration of the Westmount matter, I note that in his affidavit Mr. Taylor, a property tax consultant who appeared at the Board's hearing on behalf of the applicant, says that the Board "stated that the purchase contemplated in [the agreement between Shoppers' Park - Westmount Ltd. and Woodward Stores (Edmonton) Limited] was not an 'arm's length' transaction". There is no indication in the record provided by the Board that the Board believed that that transaction was not an arm's length transaction. If the applicant is to rely upon an alleged error of law, that error must appear upon the face of the record.
>
> Mr. Lloyd relies heavily on such cases as *Montreal v. Sun Life Assur. Co.*, [1952] 2 D.L.R. 81 (P.C.); and *Assessment Commr. of York Assessment Office v. Office Specialty Ltd.*, [1975] 1 S.C.R. 677, 49 D.L.R. (3d) 471. However, in the first of those cases the Judicial Committee of the Privy Council considered an assessment which was subject to a statutory *appeal* from the decision of the Board of Revision to the Quebec Court, and, speaking for the Judicial Committee, Lord Porter, at pp. 96-97, held that the jurisdiction of the Court to interfere with the assessment existed where the assessment was "plainly wrong in fact or is based upon some wrong principle of law". Lord Porter found error of law in that the Board of Revision had not freely exercised its discretion but had fettered itself by following a memorandum as to assessment principles, which had been prepared by the city.
>
> In the second of those cases there was a statutory appeal from the confirmation of an assessment by the Ontario Municipal Board to the Ontario Court of Appeal.
>
> There is no right of appeal to this Court from the decision of the Alberta Assessment Appeal Board. The applicant has applied for orders in the nature of certiorari. The principles to be applied by the Court are different from those which are to be applied on an appeal. This Court has no power to interfere where there is an error in fact, however plain it may be, or where there is a non-apparent error of law. It would have the power to act if there were an error of law on the face of the record. Even then, the Court itself, once having detected the error of law, would not be able to do what the Privy Council did in *Montreal v. Sun Life Assur. Co.*, for that was an appeal and this is not.

I have decided that there is not an error of law on the face of the record, but I thought that I should explain why the cases just cited, having been relied upon so heavily by Mr. Lloyd, are not of assistance to the Court in the present case.

Southgate:

The land for this shopping centre was acquired by the present owner from the Hudson's Bay Company.

The chairman's rough notes as to the Board's decision say, after dealing with Westmount: "Southgate sale not necessarily at arm's length. Not enough evidence to upset the equity established. Not too high."

The applicant says that the Board ignored the evidence of Mr. Toschak, and that there was no evidence before the Board that the Hudson's Bay Company and Southgate Shopping Centre Limited did not deal at arm's length.

This submission assumes that certiorari will issue to quash the decision of an inferior tribunal where there was no evidence before the tribunal upon which it could reach its conclusion as to a matter within its jurisdiction.

If that proposition is intended to characterize "no evidence" as a jurisdictional defect, it is erroneous in that it is contrary to the following passage from the advice delivered by Lord Sumner on behalf of the Judicial Committee in *Rex v. Nat Bell Liquors Ltd.*, [1922] 2 W.W.R. 30 at 50, [1922] 2 A.C. 128, 37 C.C.C. 129, 65 D.L.R. 1:

> "It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence, on which to convict, is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction, which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was *coram non judice*. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all."

There are Canadian authorities to the contrary in administrative law cases. They are collected in Reid's Administrative Law and Practice, pp. 337-41. They are illustrated by the judgment of Roach J.A. in *Re Ont. Labour Relations Bd. and Bradley and Can. General Electric Co.*, [1957] O.R. 316 at 334, 8 D.L.R. (2d) 65 (C.A.), which, however, with great respect, cannot be taken to have destroyed the authority of the *Nat Bell* case. It is true that in the Supreme Court of Canada, in *B.C. Labour Relations Bd. v. Can. Safeway Ltd.*, [1953] 2 S.C.R. 46, 107 C.C.C. 75, [1953] 3 D.L.R. 641, a case of certiorari, the members of the Court appear to have analyzed the evidence which was before the Labour Relations Board as to the vital issue which was before the Board. Kerwin J. found that the Board came to the right conclusion on the evidence (p. 643). Taschereau J. held that there was sufficient evidence to justify the Board's conclusion (p. 646). Estey and Cartwright JJ. held that on the evidence before the Board "it was open to the Board to come to the conclusion" to which it came (p. 652). Rand J. held that the Court was without power to interfere "so long as [the Board's] judgment can be said to be consonant with a rational appreciation of the situation presented" (p. 649). All these judgments might be taken to support the proposition that the absence of evidence to support the Board's conclusion, even though not on the face of the record, would have justified the granting of certiorari. However, the *Nat Bell* case was not cited by any of their Lordships and it is not to be inferred lightly that the Supreme Court decided sub silentio that the *Nat Bell* case is no longer the law of Canada in the sense that "no evidence" can be taken to be a jurisdictional error. In fact, it is apparent from the judgment of Cartwright J. at p. 652 that the argument had been put before the Court not in terms of the absence of evidence in support of the Board's decision being a jurisdictional error but rather in terms of its constituting an "error in law apparent on the face of the proceedings". Consequently, at most the *Canada Safeway* case is authority for "no evidence" as a reason for finding not a defect in jurisdiction but, if it is disclosed on the record, an error of law on the face of the record.

Treating "no evidence" as constituting an error of law is in accord with English authority. Thus, in *Davies v. Price*, [1958] 1 W.L.R. 434, [1958] 1 All E.R. 671 at 676, Parker L.J. said:

> " . . . if it . . . acted on no evidence, it merely erred in law and unless that error is manifest on the face of the award, the decision cannot be challenged on proceedings for an order of certiorari."

Again, in *Armah v. Govt. of Ghana*, [1968] A.C. 192, [1966] 3 All E.R. 177 at 187, Lord Reid said:

> "Whether or not there is evidence to support a particular decision is always a question of law, but it is not a question of jurisdiction."

De Smith, Judicial Review of Administrative Action, 3rd ed. (1973), p. 115, says:

> "A tribunal which has made a finding of primary fact wholly unsupported by evidence, or which has drawn an inference wholly unsupported by any of the primary facts found by it, will be held to have erred in point of law."

Care should be taken with that proposition. If it is a proposition that the evidence may be examined and that, if it is found that there was no evidence to support a finding of primary fact, the court may exercise its supervisory power by certiorari, that would be tantamount to saying that the court may act upon an error of the law even though it does not appear on the face of the record. Such a proposition is precluded by the decision in the *Nat Bell* case, at least in Canada. On the other hand, if it means that, if the *record* discloses that the tribunal has made a finding of primary fact wholly unsupported by evidence, the court may intervene by certiorari, that is a proper proposition, for then the want of evidence is an error of law and the error of law appears on the face of the record.

The cases cited by De Smith must be approached with caution as authority for the proposition if it is to be regarded as referring to the court's power to intervene by certiorari even where the absence of evidence does not appear on the face of the record. I shall now discuss the cases De Smith cited at p. 115, note 5. In *Allinson v. General Council of Medical Education & Registration*, [1894] 1 Q.B. 750, the relief sought was an injunction against the medical council, and it was admitted by counsel for the council that the council had gone beyond its statutory jurisdiction if there was no evidence upon which it might fairly and reasonably have said that the plaintiff had been guilty of "infamous conduct in a professional respect" (see Lord Esher M.R. at p. 760). In *Davies v. Price*, supra, the Court held that if the decision of the Agricultural Land Tribunal were to be attacked on the ground that there was no evidence to support its conclusion, that went to the manner of the exercise of its jurisdiction (following *Nat Bell*) and should have been the subject of a statutory appeal which was available, rather than certiorari. All the other cases cited by De Smith in note 5 on p. 115, except three, are in fact cases where the relief sought was by way of appeal or appeal by stated case; in those cases it is understandable that not only was the want of evidence treated as an error of law but the Courts felt at liberty to review and analyze the evidence to determine whether there was such an error. In other words, the cases being ones of appeal, the Courts were not limited to the record in their determination whether there was no evidence. The other three cases are as follows: *Smith v. General Motor Cab Co.*, [1971] A.C. 188: there the remedy sought was to set aside the award of an arbitrator: that ought not to be authority for the principle to be applied where the relief sought is by way of certiorari; *Regina v. Birmingham Compensation Appeal Tribunal*, [1952] 2 All E.R. 100:

this was indeed a certiorari case but the absence of evidence was treated as an error of law *on the face* of an award by the tribunal; *Maradana Mosque (Bd. of Trustees) v. Badirud-Din Mahmud*, [1967] A.C. 13, [1966] 1 All E.R. 545: while this *may* be taken as a case in which certiorari was granted because there was "no ground" on which the minister could be "satisfied" as to the existence of the fact which by statute would enable him to make the order he did make, it is more correct to treat the case, as Lord Pearce himself did (at p. 25), as one in which the Minister had "failed to consider the right question".

(Another case, not cited by De Smith in this context, but which must be noticed, is *Coleen Properties Ltd. v. Minister of Housing and Local Govt.*, [1971] 1 W.L.R. 433, [1971] 1 All E.R. 1049. The case is treated by H. W. R. Wade in (1971), 87 L.Q.R. 318 and Evans in (1971), 34 Mod. L. Rev. 561 as representing a broadening of the courts' power to intervene on the ground of "no evidence". Professor Wade even observes that the Court of Appeal turned a blind eye to the *Nat Bell* case. However, it must be observed that, like several of the cases relied upon by De Smith, the case was one of a statutory appeal.)

My conclusion is that the cases cited by De Smith are not support for the proposition that the court in England has the power to intervene by certiorari where upon an examination of material outside the record it can conclude that the inferior tribunal made a finding of fact wholly unsupported by evidence.

What, then, is the record? Until 1968 in Alberta the position was as stated by Lord Denning in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, [1959] 2 W.L.R. 826, [1959] 2 All E.R. 433 at 445:

> "Now, turning to modern cases, it will be seen that, in our day too, the courts have proceeded on the footing that there should be included in the record, not only the formal order, but all those documents which appear therefrom to be the basis of the decision — that on which it was grounded."

This passage was quoted with evident approval by Porter J.A. delivering the judgment of the Appellate Division of this Court in *Stedelbauer Chevrolet Oldsmobile Ltd. v. Industrial Relations Bd. (Alta.)* (1968), 59 W.W.R. 269 at 278, 61 D.L.R. (2d) 401 (*sub nom. Regina v. Industrial Relations Bd. (Alta.); Ex parte Stedelbauer Chevrolet Oldsmobile Ltd.*), affirmed 65 W.W.R. 344, [1969] S.C.R. 137, 1 D.L.R. (3d) 81. On appeal to the Supreme Court of Canada, Martland J., delivering the judgment for that Court, at p. 145 referred only to the reasons of the Board as what "spoke" intelligibly so that error of law could be detected. Yet it is apparent from his judgment that he had examined the union's constitution. The judgments do not make it clear whether the details of the union's constitution had been set out in the Board's reasons. In *Farrell v. Workmen's Compensation Bd.*, 33 W.W.R. 433, 26 D.L.R. (2d) 185, affirmed 37 W.W.R. 39, [1962] S.C.R. 48, 31 D.L.R. (2d) 177, the British Columbia Court of Appeal held (per Coady J.A. at p. 196 and Sheppard J.A. at p. 201) that the record consisted only of the initiating document, the pleadings, if any, and the adjudication (including the reasons if incorporated in the decision) but not the evidence or the supporting documents referred to in the adjudication. In the Supreme Court of Canada, Judson J., delivering the judgment of the Court, said very succinctly at p. 179 that he agreed with the majority of the Court of Appeal "that the Board's return, consisting of the application and its decision, was a proper one".

However, the Rules of Court adopted in Alberta in 1968 by O.C. 2208/68, effective 1st January 1969, included for the first time in the Crown Practice Rules in civil matters, among the rules relating to certiorari, R. 743(2), which has the effect of deeming "the evidence and all exhibits filed" before the tribunal "to be part of the record". Perhaps it would be as well to quote the entirety of R. 743:

"743. Upon the notice of motion for an order in the nature of certiorari shall be endorsed a notice to the following effect adapted as may be necessary, addressed to the magistrate, justice or justices, officer, clerk or tribunal:

"'You are hereby required forthwith after service hereof to return to the clerk of the Supreme Court at __________ (as the case may be) the judgment, order or decision (or as the case may be) and reasons therefor herein referred to together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter as fully and entirely as they remain in your custody, together with this notice.

"'Date ____________________

"'To A.B., magistrate at ________________ (or as the case may be).

"'(Signed) C. D. ________________________________

(Solicitor for the Applicant).'

"(2) All things required by this Rule to be returned to the clerk of the Supreme Court shall for the purposes of the application for an order in the nature of *certiorari*, be deemed to be part of the record."

(In criminal matters, R. 831 is to the same effect, that is, since 1968 the evidence and exhibits filed "shall, for the purposes of the application for an order in the nature of *certiorari*, be deemed to be part of the record".)

It is a nice question whether R. 831(2) falls within the power which The Judicature Act, R.S.A. 1955, c. 164, s. 38 [now R.S.A. 1970, c. 193, s. 39] gave in 1968 to the Lieutenant Governor in Council, to "make and authorize the promulgation of" rules governing "the practice and procedure in the [Supreme] Court". The validity of the Alberta Rules of Court, insofar as they may be said to affect substantive rights as compared with procedural matters, has been the subject of Report No. 15 of the Institute of Law Research and Reform at the University of Alberta, published in December 1974.

Whether R. 831(2) is intra vires the Lieutenant-Governor in Council has not been argued before me. I shall therefore assume that it is intra vires. If it is, then the result is that in civil matters the decision in the *Nat Bell* case is no longer applicable in Alberta.

I am therefore at liberty to examine the evidence and the documents filed before the Board.

The evidence was not transcribed. However, the documents included the "Summary of Salient Facts and Conclusions" filed on behalf of the city. This document constitutes evidence upon which the Board might reasonably conclude that the city's assessment was correct. (I take it that the words actually used by the Board, viz., "Not enough evidence to upset the equity established. Not too high", are intended to constitute such a finding.)

As for the other reason given by the Board, viz., "Southgate sale not necessarily at arm's length", there is no evidence in the record to suggest that the sale was not at arm's length. However, there is no transcript of the evidence which forms part of the record. On this question, therefore, the record, even broadened in scope as it is by R. 743(2), retains, for the purpose of a submission that there was "no evidence" and hence an error of law, what Lord Sumner called "the inscrutable face of a sphinx" (in *Nat Bell*, at p. 56). Where no duty is imposed upon the tribunal to keep a stenographic or tape-recorded transcription of its proceedings, the exercise by the Court of its prerogative supervisory power is disarmed. (I adapt the language of Lord Sumner at p. 56, describing the effect of the Summary Jurisdiction Act, 1848 (Imp.), c. 43.) It is simply not possible for the Court to determine whether or not there was evidence which supports the conclusion in question.

Therefore the reasons given by the Board in the chairman's notes cannot be attacked by certiorari as errors of law on the face of the record on the ground that there was no evidence to support them.

PART 34

ADMINISTRATION AND SIMILAR PROCEEDINGS

Definition

411. In this Part an "administration proceeding" means a proceeding for the administration under the direction of the court of the estate of a deceased person or for the execution under the direction of the court of a trust.

Relief to be granted

412. A proceeding may be taken by originating notice for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration proceeding and a claim need not be made in the proceeding for the administration or execution under the direction of the court of the estate or trust in connection with which the question arises or the relief is sought.

Proceedings to be taken

413. Without prejudice to the generality of Rule 412, a proceeding may be taken by originating notice for the determination of any of the following questions:

(*a*) any question arising in the administration of the estate of a deceased person or in the execution of a trust;

(*b*) Any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;

(*c*) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.

Proceedings for relief

414. Without prejudice to the generality of Rule 412 proceedings may be brought by originating notice for any of the following reliefs:

(*a*) an order requiring an executor, administrator, or trustee to furnish and, if necessary, verify accounts;

(*b*) an order requiring the payment into court of money held by a person in his capacity as executor, administrator or trustee;

(*c*) an order directing a person to do or abstain from doing a particular act in his capacity as executor, administrator or trustee;

(*d*) an order approving any sale, purchase, compromise or other transaction by a person in his capacity as executor, administrator or trustee;

(*e*) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the court.

Parties

415. (1) When proceedings under this Part are taken all the executors or administrators of the estate or trustees of the trust, as the case may be, shall be parties to the proceedings and where the proceedings are brought by executors, administrators or trustees, any of them who do not consent to being joined as an applicant shall be made a respondent.

(2) Where in the proceedings for the administration of the estate of a deceased person, a claim in respect of a debt or other liability is made against the estate by a person not a party to the proceedings, no party other than the executors or administrators of the estate is entitled to appear in any proceedings relating to that claim without the leave of the court, but the court may direct or allow any other party to appear either in addition to, or in substitution for, the executors or administrators on terms as to costs or otherwise.

(3) In an administration proceeding or a proceeding as referred to in Rule 414 the court may make any order and grant any relief to which the applicant may be entitled by reason of breach of trust, wilful default or other misconduct of the respondent notwithstanding that the proceeding was begun by originating notice.

(4) A judgment or order for the administration or execution under the direction of the court of an estate or trust need not be given or made unless in the opinion of the court the questions at issue between the parties cannot properly be determined otherwise than under such judgment or order.

Proceeding by creditor

(5) Where an administration proceeding is brought by a creditor of the estate of a deceased person or by a person claiming to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust, and the applicant alleges that no or insufficient accounts have been furnished by the executors, administrators or trustees, as the case may be, then, without prejudice to its other powers, the court may

(*a*) order that the proceedings be stayed for a period specified in the order and that the executors, administrators or trustees, as the case may be, shall within that period furnish the applicant with proper accounts, and

(*b*) if necessary to prevent proceedings by any other person claiming to be so entitled, give judgment or make an order for the administration of the estate to which the proceeding relates and include therein an order that no proceedings are to be taken under the judgment or order, or under any particular account or inquiry directed, without the leave of the court.

Conduct of sale

416. Where an order is made for the sale of any property vested in executors, administrators or trustees, those executors, administrators or trustees, as the case may be, unless the court otherwise orders, shall have the conduct of the sale.

Jurisdiction and powers of court

417. (1) This Rule applies to a proceeding for

(*a*) the administration of the estate of a deceased person, or

(*b*) the execution of a trust, or

(*c*) the sale of any property.

(2) The court may require any person to be made a party to the proceeding, may give the conduct of the proceeding, or any part thereof, to any party, and may make any necessary order to place any party on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

(3) The court may, when giving a judgment or order which affects the rights or interests of persons not parties to the proceedings or which directs an account to be taken or inquiry made, direct notice of the judgment or order to be served on any person interested in the estate or under the trust or in the property, as the case may be; and any person served with notice of a judgment or order in accordance with this Rule is, subject to the other subrules of this Rule, bound by the judgment or order to the same extent as he would have been if he had originally been made a party to the proceeding.

(4) The court may direct a notice of judgment or order, endorsed with a memorandum in Form H to be served personally or in such manner as it may specify on the person required to be served or if it appears to the court that it is impractical to serve the notice on any person it may dispense with service of the notice on such person.

(5) Where the court dispenses with service of notice of a judgment or order on any person, it may also order that that person is bound by the judgment or order to the same extent as if he had been served with notice thereof and he is bound accordingly except where the judgment or order has been obtained by fraud or nondisclosure of material facts.

(6) A person served with notice of a judgment or order may within 14 days after service apply to the court to discharge, vary or add to the judgment or order.

(7) A person served with a notice of a judgment or order may attend the proceedings under the judgment or order.

RENEWAL OF JUDGMENT

New judgment

331. (1) Where a judgment or any part thereof remains unsatisfied, a judgment creditor, at any time before proceedings under the judgment would be barred by *The Limitation of Actions Act*, may serve upon the judgment debtor a notice of motion requiring him to appear before a judge in chambers and show cause why the judgment creditor should not have a new judgment for the amount remaining due and unpaid on the original judgment and the proceeding shall be deemed an action on a judgment or order of the court.

(2) Rule 548 does not apply to subrule (1).

(3) The notice of motion shall issue in the original cause or matter and shall be served upon the judgment debtor in the same manner as a statement of claim at least 15 days before its return date.

(4) If, upon the return of the motion, the judgment debtor does not appear and the court is satisfied

(*a*) as to service of the notice of motion, and

(*b*) as to the amount still due and unpaid under the original judgment

the court may order that the judgment creditor have leave to enter a new judgment for the amount so due and costs, if in the discretion of the court costs are allowed.

(5) If the judgment debtor appears and disputes the judgment creditor's claim in whole or in part, the court may give directions for the trial of an issue with or without pleadings as the circumstances of the case require, and give all necessary directions.

See Sanders v Nousek, judgment of the Master in Chambers [1975] 3 W.W.R. 125 and discussion of the principle enunciated therein is fully developed in the main text hereof at page 87.